Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

MAURICE BIANCHI fdba
M. BIANCHI OF CALIFORNIA,
Petitioner,

v.

WILLIAM F. RYLAARSDAM, DAVID G. SILLS
and EDWARD J. WALLIN, et al.,
Respondents.

BANK OF AMERICA NATIONAL
TRUST & SAVINGS ASSOCIATION,
Real-Party-In-Interest.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit err in holding that the *Rooker-Feldman Doctrine* applied to bar Bianchi's civil rights action alleging a denial of his threshold due process right to have his State Court appeal decided by a neutral and detached adjudicator?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Maurice L. Bianchi is an individual who had conducted business under the trade name and style of "M. Bianchi of California," a sole proprietorship.

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Fowler, Carlo S., *Mandamus, as an Original Proceeding in the California Appellate Courts, The Hastings Law Journal,*
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The June 27, 2003, Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 334 F.3d 895 (9th Cir. 2003) and is reprinted at App. 3a. The Order of the United States District Court for the Central District of California dismissing Bianchi's Complaint is reprinted at App. p. 27a.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals issued its Decision on June 27, 2003. The Ninth Circuit denied Petitioner's Petition for Rehearing and Suggestion for Rehearing, En Banc, on September 8, 2003. This Petition for Certiorari is timely in that Petitioner has filed it within 90 days of September 8, 2003. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) and §2106.

STATUTORY PROVISIONS INVOLVED

California Code of Civil Procedure 170.6 is a relevant Court rule involved in this Petition. Its text is reprinted at App. 120a.

STATEMENT OF THE CASE

I. Overview of the Case

The Ninth Circuit Panel held by a 2-to-1 majority that the *Rooker-Feldman Doctrine* applied to bar Petitioner's Complaint in the United States District Court for the Central District of California seeking relief from a State Court deprivation of his threshold due process right to have his appeal heard by neutral and detached adjudicators. A Judge

of the Panel concurred in the result but not in the rationale that the *Rooker-Feldman Doctrine* was applicable to bar Petitioner's claim. App. 3a.

The United States Court of Appeals for the Ninth Circuit denied, without comment, Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc on or about September 8, 2003. App. 1a.

II. Background of the Case

Maurice L. Bianchi, doing business under the proprietorship name of M. Bianchi of California, a government contractor manufacturing mens' and womens' military uniforms for the United States Army, Navy and Air Force, and Bank of America National Trust & Savings Association sued each other in the Superior Court of the State of California in and for the County of Orange. Bianchi claimed that Bank of America had converted progress payments paid him under government contracts and converted loan proceeds guaranteed by the Small Business Administration which he borrowed to service the government contracts, resulting in damage to him, and the Bank sued Bianchi for monies claimed due under promissory notes and placer memoranda. The matter was tried before a jury over a period of seven months with some ninety days of testimony. At the conclusion of the case, the jury was charged and returned a verdict in favor of the Bank and against Bianchi upon Bianchi's claims and in favor of the Bank and against Bianchi on the Bank's claims. Bianchi then filed post-trial motions for Judgment Notwithstanding the Verdict and for a New Trial.

During the pendency of the post-trial motions for judgment notwithstanding the verdict and for a new trial, the

state court trial judge, the Honorable Mason Fenton, recused himself after first denying the Bank's Motion to force his disqualification. The case was then randomly assigned to another judge of the Superior Court, William F. Rylaarsdam. Unbeknownst to Bianchi at that time, his counsel filed an application under California Civil Procedure Code Section 170.6 to disqualify Judge Rylaarsdam on the grounds that he was prejudiced against Bianchi or Bianchi's counsel, or the interest thereof, so that Bianchi could not, or believed that he could not, have a fair and impartial hearing.

Pursuant to the application under Code of Civil Procedure Section 170.6 and the Affidavit filed in support thereof, Judge Rylaarsdam was disqualified from Bianchi's case. A third judge, the Honorable Donald E. Smallwood, was assigned to the case and disposed of the post-trial motions. The Bank then appealed and Bianchi cross-appealed various claims of error to the Court of Appeal of the State of California, Fourth Appellate District. App. 118a.

The appeal was heard by a three-judge panel of the Court of Appeal consisting of Judges Sills, Wallin and the same William F. Rylaarsdam who had been disqualified from hearing the post-trial motions in Bianchi's case, below. Judge Rylaarsdam conducted the majority of the questioning of counsel at oral argument and authored the Decision denying Bianchi's appeal in the case from which he had been disqualified.

The fact of Judge Rylaarsdam's disqualification was not immediately known to Bianchi but was discovered by appellate counsel in reviewing the records of the case and of the case appeal after entry of the Decision of the Court of Appeal. As a result, Bianchi, first, sought to have the Court of Appeal withdraw its Remittitur and reassign the case for

reargument before a different panel or a different appellate district. App. 98a. Rather than that motion be entertained by the Chief Judge of the Fourth Appellate District, it was entertained by the Chief of the three judge panel who decided Bianchi's appeal, and was summarily denied. App. 97a. Therefore, Bianchi filed a Petition for Writ of Certiorari to the California Supreme Court. That Petition was not accepted for filing as the Clerk deemed it to have been submitted for filing one day late. App. 116a. Thereafter, Bianchi filed a Petition for Writ of Mandate to the California Supreme Court, which denied that application without comment. App. 96a. Bianchi thereafter filed an action in the United States District Court for the Central District of California pursuant to 42 U.S.C. §1983 and §1988, claiming that his due process right to have his case adjudicated by a neutral and detached adjudicator had been violated. App. 92a.

The Defendants below, including Judge Rylaarsdam, brought a Motion to Dismiss Bianchi's District Court case claiming, in and among other things, that the suit in the United States District Court violated the proscriptions of the *Rooker-Feldman Doctrine*. App. 44a. Bianchi opposed the Motion to Dismiss on the grounds that the deprivation of his Federal constitutional due process right to have his case decided by a neutral and detached adjudicator in the first instance was a threshold issue which made the *Rooker-Feldman Doctrine* inapplicable. The United States District Court granted the Motion to Dismiss. App. 27a, 29a. Bianchi appealed to the Ninth Circuit. App. 24a.

In its Decision, dated June 27, 2003, the Ninth Circuit Panel, by a 2-to-1 majority (in which the third judge concurred in the result although not in the reasoning) denied Bianchi relief on the ground that Bianchi was a "disappointed litigant" who attempted to obtain in Federal Court the very

relief denied him in State Court "because of the alleged bias of one of the Justices." App. 3a. On July 17, 2003, Bianchi filed a Petition for Rehearing and a Suggestion for Rehearing En Banc which were denied by the Court by Order dated September 8, 2003. App. 1a. This appeal timely followed.

III. Proceedings Below

In State Court, Bianchi's claims against Bank of America and the Bank's claims against Bianchi were tried to a jury over a period of seven months, resulting in a verdict against Bianchi and in favor of the Bank. During the pendency of Bianchi's post-trial Motion for a Judgment Notwithstanding the Verdict and Motion for a New Trial, the Trial Judge, the Honorable Mason L. Fenton, recused himself after first denying the Bank's Motion to force his disqualification. The case was then randomly reassigned to William F. Rylaarsdam, then a Judge of the Superior Court of the State of California, in and for the County of Orange. Unbeknownst to Bianchi at that time, his attorneys filed an application pursuant to California Code of Civil Procedure 170.6 seeking the disqualification of Judge Rylaarsdam upon the ground that that Judge was prejudiced against Bianchi or Bianchi's counsel, or the interests thereof, so that Bianchi could not, or believed that he could not, have an impartial hearing. As that application was properly supported by affidavit in substantially the form as required by Code of Civil Procedure 170.6, the Honorable William F. Rylaarsdam was disqualified from the case. The Honorable Judge Donald Smallwood was then randomly assigned to resolve the post-trial motions and did so.

Bank of America then appealed to the Court of Appeal of the State of California from a finding that it had acted in bad faith in attempting to assert claims against Bianchi in violation

of California's "One Action Rule" and Bianchi cross-appealed from the jury's verdict. Oral argument was entertained before a three judge panel of the Court of Appeal, consisting of Judges Sills, Wallin and the previously disqualified William F. Rylaarsdam who, himself, led in the majority of the questioning from the bench during oral argument and authored the Decision denying Bianchi's appeal.

Appellate counsel, in reviewing the record as against the decision authored by Judge Rylaarsdam, discovered that Judge Rylaarsdam was the same Judge who previously had been assigned to, and then disqualified from, Bianchi's case. Accordingly, Bianchi brought an application before the Court of Appeal, Fourth Appellate District, seeking a recall of the Remittitur and the reassigning of his appeal for argument and decision before a different panel of the Court or before a panel sitting in a different appellate district. Rather than the Chief Judge of the Court entertaining that Motion, it was summarily denied by Judge Sills, the Chief of the three judge panel (including Judge Rylaarsdam) which denied Bianchi's appeal in the first instance.

Thereafter, Bianchi sought to appeal the appellate Panel's decision in the California Supreme Court. That appeal was never filed as the Clerk deemed it to be one day late. App. 116a. Thereafter, Bianchi brought a Petition for Writ of Mandate to the California Supreme Court, seeking an order of the Supreme Court recalling the Remittitur and the reassignment of the case before a different panel of the Fourth Appellate District or before a panel of a different District of the Court of Appeal. The Supreme Court of California summarily denied that Petition. App. 96a.

On or about October 6, 1999, Bianchi filed a Complaint in the United States District Court for the Central District of

California, claiming that his right to due process in having his case on appeal heard and adjudicated by a panel of neutral and detached adjudicators was denied him and seeking mandatory injunctive relief as allowed by Title 42 U.S.C. 1983. App. 32a. The Defendants, below, including the Honorable William F. Rylaarsdam, brought a Motion to Dismiss Bianchi's Complaint upon the grounds, in and among others, that the claim that the Federal action violated the proscriptions of the *Rooker-Feldman Doctrine*. App. 44a. Bianchi opposed the Motion to Dismiss upon the grounds that he had been denied due process, in the first instance, in his appeal being decided by a Judge who had been previously disqualified from the very same case, below. App. 58a.

The United States District Court for the Central District of California granted the Motion to Dismiss and Bianchi appealed to the Ninth Circuit Court of Appeals. App. 27a, 29a.

By a 2-to-1 majority (in which the third judge, Betty B. Fletcher, concurred in the result but not in the reasoning of the majority of the Panel), the order dismissing Bianchi's Complaint was affirmed. Bianchi sought a rehearing and suggested rehearing en banc but his Petition for Rehearing and Suggestion for Rehearing En Banc were denied. App. 1a. This Petition timely followed.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 identifies considerations used by the Court in deciding whether to exercise its discretion to grant a Petition for Writ of Certiorari. One consideration is that "a State Court or United States Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court." Another

consideration is that a "United States Court of appeals has decided an important question of federal law...that conflicts with relevant decisions of this Court."

This case presents such issues.

Bianchi sought relief in the United States District Court alleging civil rights and due process violations in a disqualified state court judge authoring a decision on appeal in the very case from which that judge had been disqualified. Bianchi argued that the participation of the previously disqualified judge in leading the questioning at oral argument and in authoring the Decision on appeal deprived him, in the first instance, of due process guaranteed him by the United States Constitution. Specifically, Bianchi complained that because a state court judge who had been previously disqualified at the trial level participated in, and authored the Decision resolving, an appeal from the very case from which that judge had been disqualified, Bianchi had been deprived of a threshold due process right, that is, the right to have his case decided by a neutral and detached adjudicator. Bianchi argues, in essence, that the Federal due process right to have a case decided by a neutral and detached adjudicator was a threshold issue and that, by being denied that right, he had been effectively, and for all intents and purposes, denied access to the state appellate court.

Whether the *Rooker-Feldman Doctrine* should be applied to bar such a threshold Federal due process right is an issue of law not previously decided, but because of its Constitutional magnitude, should be decided by this Court.

Moreover, the Decision of the Ninth Circuit conflicts with decisions of this Court which hold the right to have a case heard by a neutral and detached adjudicator to be an issue of

due process, in the first instance, which cannot be cured by appeal or trial de novo.

The Ninth Circuit's application of the *Rooker-Feldman Doctrine* to bar suits such as Bianchi's civil rights claim conflicts with decisions of this Court which hold that such a deprivation, in the first instance, is of constitutional magnitude, and the apparent conflict between the decisions of this Court on that issue, and the Ninth Circuit in this case, should be resolved by this Court.

The Court's review is warranted for these reasons.

I. Review is Warranted Because the Application of *Rooker-Feldman* Trumped Bianchi's Threshold and Fundamental Due Process Right to Have His Case Decided by a Neutral and Detached Adjudicator

In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, (1923), this Court held that if Constitutional questions stated in a bill of error actually arose in the cause, it was the province and duty of the state courts to decide them and the state court's decision, whether right or wrong, was an exercise of jurisdiction. In *Rooker,* the plaintiff alleged that the state Supreme Court's judgment was void because one of the judges had an "improper interest in the case which worked his disqualification." *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416-17 (1923). This Honorable Court reached the merits of the judicial disqualification claim after fully and extensively discussing the allegation of judicial bias. After concluding that the claim was factually without merit, the Court dismissed the claim and held that "the facts set forth and relied upon neither support nor tend to support the charge." Ibid at 417.

In *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983), this Court held that lower federal courts generally may not review state court judgments directly.

The *Rooker-Feldman Doctrine,* established by considering together this Court's holding in *Rooker v. Fidelity Trust Company,* supra, and in *D.C. Court of Appeals v. Feldman,* supra, is a principle which provides that Federal courts lack jurisdiction to hear appeals from State court decisions if the claims raised in the Federal court action are inextricably intertwined with the State court's decision such that the adjudication of the Federal claims would undercut the State court ruling or require the Federal District Court to interpret the application of State laws or procedures. *Bianchi v. Rylaarsdam*, 334 F.3d 895, 898 (2003), citing *D.C. Court of Appeals v. Feldman,* supra.

In the instant case, the Ninth Circuit concluded that Bianchi's 42 U.S.C. §1983 Complaint alleging a threshold deprivation of due process required, of necessity, the District Court to overrule **implied** determinations of the state court resolving Bianchi's Federal constitutional issues and that, therefore, *Rooker-Feldman* was applicable and the District Court lacked subject matter jurisdiction. *Bianchi v. Rylaarsdam,* supra.

The Ninth Circuit found that Bianchi asked the United States District Court to review the state court's denial in a judicial proceeding of Bianchi's efforts to have the Remittitur from the court of appeal recalled and his case argued and decided by a panel which consisted of neutral and detached jurists after the State Supreme Court considered the Federal constitutional claims **by implication**. Ibid, at 334 U.S. 900.

In doing so, however, the Ninth Circuit mischaracterized Bianchi's claim, calling it a case of "a disappointed litigant's attempt to obtain in federal court the very relief denied to him in state court, namely an injunction vacating a decision by the California Court of Appeal and reassigning his case to a different division or district because of the alleged bias of one of the justices." Ibid, at 334 U.S. 896.

This characterization fails to account for the fact that, unlike cases upon which the Ninth Circuit relied, see, e.g. *Howell v. Supreme Court of Texas*, 885 F.2d 308 (5th Cir. 1989), this was not a case in which Bianchi attempted to utilize the Federal Court to disqualify a state court jurist. Rather, Bianchi's claim was based upon the fact that a judge previously disqualified for a bias nonetheless participated in the appellate review of the very case from which that judge had been disqualified. The Ninth Circuit erroneously characterized the basis of Bianchi's claim as being an attempt to force a disqualification of a judge under state court rules when, in fact, the judge had been disqualified but participated in the decision of the case from which he was disqualified, thus depriving Bianchi of a fundamental and threshold due process right.

Moreover, the Ninth Circuit's Decision facially is in conflict with decisions of this Court in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) and in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California,* 508 U.S. 601 (1993), which stand for the proposition, among others, that the right to have a matter adjudicated, in the first instance, by a neutral and detached adjudicator was a due process right which, by its nature, was incapable of being cured by appeal or trial de novo.

The Ninth Circuit further erred in its characterization of the basis of Bianchi's claim by referring to Judge Rylaarsdam's disqualification as based upon an "alleged bias." *Bianchi v. Rylaarsdam,* supra, at 334 F.3d 896. However, by the procedure set forth in Code of Civil Procedure (CCP) 170.6, Judge Rylaarsdam had been disqualified for bias. In *Solberg v. Superior Court,* 137 Cal.Rptr. 460, 561 P.2d 1148 (1977), the Supreme Court of California held that the real-party-in-interest had standing to make a motion for disqualification and that a writ of mandate was proper to compel the Superior Court judge to vacate his order denying the motion for disqualification; that the belief of a litigant that he cannot have a fair trial before the assigned judge, when expressed under oath in an affidavit, constitutes sufficient grounds for disqualification under Code of Civil Procedure 170.6; that it is unnecessary to oblige the affiant to go behind his oath and prove his good faith allegations of bias and that to do so would constitute a substantial departure from the statutory scheme set forth in CCP 170.6; that the disqualification procedure found at CCP 170.6 remains a reasonable and, hence, constitutionally valid accommodation of the competing interests of the bench, bar and public on the issue of judicial bias.

Thus, as opposed to the characterization of the Ninth Circuit and the cases upon which the Circuit relied, Bianchi did not complain that Judge Rylaarsdam should have been disqualified. Rather, Bianchi complained that because Judge Rylaarsdam had been disqualified, his participation as the judge authoring the Decision of the appeal in the very case from which he had been disqualified violated Bianchi's threshold due process right to have his case adjudicated by a neutral and detached adjudicator and effectively deprived him of his day in the appellate court.

II. The Merits of Bianchi's State Court Claims Were Never Reached by the California Supreme Court, Nor Were They Considered by Implication

As interpreted by the Ninth Circuit, the *Rooker-Feldman Doctrine* provides that if claims raised in the Federal Court action are inextricably intertwined with the State Court's decision such that the adjudication of the Federal claims would undercut the State ruling or require the District Court to interpret the application of state laws or procedural rules, the Federal complaint must be dismissed for lack of subject matter jurisdiction. *Bianchi v. Rylaarsdam*, supra.

Bianchi filed a Petition for Writ of Certiorari to the California Supreme Court from the Decision of the Court of Appeal. However, that Petition was returned, unfiled, upon the Clerk's assessment that it had been received one day late and, therefore, the Supreme Court lacked jurisdiction to entertain it. Indeed, the Petition was returned with a cover letter from the Clerk (App. 116a), indicating that it was rejected as untimely. As a result, any suggestion that the merits of the Federal constitutional claims were reached by the California Supreme Court, either directly or by implication, as a result of Bianchi's appeal is erroneous. Because the appeal was never accepted for filing, the Federal constitutional issues were never presented to, nor were they resolved by, the California Supreme Court.

The Ninth Circuit, however, found that the California Supreme Court's denial of Bianchi's subsequent Petition for Writ of Mandate implies that the merits of the Federal constitutional argument were presented to and rejected by the State's high court in denying the Writ: "The silence of the California court did not indicate that they failed to consider

the constitutional claims presented to them." *Bianchi v. Rylaarsdam,* supra, at 334 F.3d 900. Having determined that the Federal constitutional claims were presented to the state court and rejected by implication, the Ninth Circuit held that the relief that Bianchi sought could not be granted without undoing the implicit decision of the state court in violation of the *Rooker-Feldman Doctrine,* which precludes review of all state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. However, the implication that the Federal constitutional grounds were considered by the Supreme Court in a summary denial of the Petition for Writ of Mandate does not follow from an application of California law and is erroneous.

In order for a California appellate court to exercise its discretion to take jurisdiction of an original proceeding for Writ of Mandate, two fundamental conditions must be satisfied:

First, the proceedings must not raise factual issues but must present solely questions of law;

Second, the proceeding must be one involving the public interest or welfare rather than one involving strictly private rights.

If both of these conditions are met, the proceeding is a prime candidate for disposition as an original action by the appellate courts. See, "Mandamus, as an Original Proceeding in the California Appellate Courts," *Carlo S. Fowler,* The Hastings Law Journal, Volume 15, November 1963.

Therefore, only two things may be implied from the summary denial of a Petition for Mandamus, that is, either the

petition raised factual issues and/or that the petition did not involve public interest or welfare but private rights.

Juxtaposed against the limited grounds for discretionary jurisdiction in original proceedings for writ of mandate are the grounds for appellate review in the California Supreme Court. As set forth in Rule 29 of the California Rules of Court, the grounds for review by the State Supreme Court are:

1. Where it appears necessary to secure uniformity of decisions or the settlement of important questions of law;

2. Where the Court of Appeal was without jurisdiction of the cause; or

3. Where because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges.

Rule 29(a) California Rules of Court.

Thus, the premise that the California Supreme Court reached the merits of Bianchi's Federal constitutional claims in denying his Petition for Writ of Mandate is erroneous.

Insofar as the state court failed to address the merits of the Federal constitutional argument, *Rooker-Feldman* has no application to Bianchi's Complaint. The Complaint in the United States District Court for the Central District of California was the first venue, other than in the offending

Court of Appeal, itself, in which the Federal constitutional claims were raised for consideration.[1]

Moreover, as the issue presented in Federal court was whether Bianchi was denied a threshold due process right to a neutral and detached adjudicator, the injury, itself - the deprivation of that threshold due process right - was "distinct from [the State Court of Appeal] judgment" denying the State appeal. *Garry v. Geils,* 82 F.3d 1362, 1365 (7th Cir. 1996).

Accordingly, the United States District Court for the Central District of California had subject matter jurisdiction and should not have dismissed Petitioner's Complaint on the ground that it lacked such jurisdiction.

III. Assuming, Arguendo, that the California Supreme Court Impliedly Reached the Merits of Bianchi's Federal Constitutional Challenge, the Issue as to Whether the Denial of a Fundamental and Threshold Civil Right Trumps the Application of *Rooker-Feldman* is an Important Issue of Law Which Should be Decided by this Court

Assuming, arguendo, that the California Supreme Court reached the merits of Bianchi's Federal constitutional claims by implication in its denial of his Petition for Writ of

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[1] In his Motion to Recall Remittitur filed in the Court of Appeal, Bianchi raised Fourteenth Amendment grounds "only for the purpose of complying with *Governmental & Civic Employees Organizing Committee, C.I.O. v. Windsor*, 353 U.S. 364 (1957)"...so that "[i]f the State Courts rule against [Bianchi] on the question of State Law, [Bianchi] intends to seek resolution in the Federal system of his Federal Claims."

Mandate, (it did not), this Court should entertain this appeal and decide the important issue as to whether *Rooker-Feldman* was intended to, or should, prevent the United States Courts from entertaining a claim of deprivation of a threshold constitutional right to a neutral and detached adjudicator in the first instance.

Unlike the cases upon which the Ninth Circuit relied, Bianchi's case did not involve the refusal of a judge to disqualify himself when challenged or subsequent efforts in Federal court to force that disqualification. Rather, in Bianchi's case, the judge, in fact, had been disqualified from participation in the case at the trial level and, later, sat in judgment of the appeal in the very case from which he had been disqualified.

In *Ward v. Village of Monroeville,* 409 U.S. 57 (1972), the mayor of Monroeville, Ohio, in a contested case, convicted an accused of two traffic offenses and fined him $50.00 for each offense pursuant to the Ohio statutory provisions authorizing mayors to sit as judges in cases of ordinance violations and certain traffic offenses. The conviction was sustained by both the Ohio Court of Appeals and by the Ohio Supreme Court. On certiorari, this Court reversed. In an opinion authored by the Honorable Justice Brennan expressing the views of seven members of the Court, this Court held, in and among other things, that since an accused is entitled to a neutral and detached judge in the first instance, the trial by a mayor, who had a conflicting interest in increasing municipal revenues, was not constitutionally acceptable merely because the case was subject to appeal in a trial de novo in a higher State court.

Consistent with that holding, this Honorable Court, in *Concrete Pipe and Products of California, Inc. v.*

Construction Laborers Pension Trust for Southern California, 508 U.S. 601 (1993), held that due process requires a neutral and detached judge, in the first instance, and before one may be deprived of a protected interest, whether in a criminal or civil setting, one is entitled, as a matter of due process of law, to an adjudicator who is not in a situation which would offer possible temptation to the average man or judge which might lead him not to hold the balance of evidence and law nice, clear and true; and that even appeal and trial de novo will not cure the failure to provide a neutral and detached adjudicator required as a matter of due process in the first instance.

Succinctly, depriving a litigant the right to have his claim heard by a neutral and detached adjudicator effectively bars the litigant from the courthouse door.

Such is Bianchi's dilemma. While his appeal from the jury verdict was filed appropriately in the Court of Appeal, while a panel of that Court heard oral argument and while that panel issued a decision, the panel consisted of a judge who, while a trial court judge, had been disqualified from Bianchi's case, and who, as an appellate court judge, led the questioning of counsel during the oral argument and authored the appellate decision resolving Bianchi's appeal in the very case from which the Judge had been disqualified.

In essence and in effect, Bianchi was denied his day in state appellate court because of the involvement of the disqualified judge. Bianchi had neither a neutral, nor detached, adjudicator deciding his case and, therefore, suffered a threshold deprivation of a fundamental due process right recognized by this Court in *Ward v. Village of Monroeville,* supra, and in *Concrete Pipes Products of California, Inc. v. Constructions Laborers Pension Trust for Southern California,* supra.

On the other hand, *Rooker-Feldman* seems to bar a person situated as Bianchi in his case in Federal court from raising that threshold deprivation of a fundamental due process right if, either directly or by implication, that deprivation had been considered by a State Court.

This Court, neither in *Rooker*, nor in *Feldman,* held, inferred or implied that such threshold deprivation would not be considered in the Federal Courts, even if first presented in a state court. Indeed, as noted by Judge Fletcher in concurrence, below, this Court, itself, carved out an exception to the rule that the general jurisdiction statutes do not permit a lower Federal court to adjudicate a Federal law claim that, if meritorious, overturns a State Court judgment. *Bianchi v. Rylaarsdam*, 334 F.3d at 903. In *Rooker v. Fidelity Trust Company,* supra, this Court held that if the constitutional question stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide and the state court decision, whether right or wrong, was an exercise of jurisdiction. Nevertheless, in deciding *Rooker,* this Honorable Court addressed the merits of the underlying claim that the State Supreme Court's judgment was void because one of the judges had an improper interest in the case which warranted his disqualification. This Honorable Court addressed the merits of the judicial disqualification claim and denied the appeal only after fully and extensively discussing the allegation of judicial bias and concluding that the claim was factually without merit. As Judge Fletcher noted, that aspect of *Rooker* has not been overruled and, therefore, an attack on the authority of a state court to adjudicate a case because a state court judge should have been disqualified is not subject to dismissal under the *Rooker-Feldman Doctrine*. Ibid.

Moreover, as Judge Fletcher noted, there is nothing in *D.C. Court of Appeals v. Feldman*, supra, that overrules *Rooker* on that point and none of this Court's other cases that discuss *Rooker,* and as enumerated in Judge Fletcher's concurrence, 334 F.3d at 903-904, overruled any aspect on that point either. Ibid. Therefore, Judge Fletcher stated that Bianchi should have come directly to Federal court in his §1983 action to challenge the California Court of Appeal disposition of his direct appeal and that doing so would not render the claim subject to dismissal under *Rooker-Feldman.* Ibid, at 904.

Bianchi asserts that, given the nature of his claim, a threshold claim that he was denied his day in court by deprivation of a federally protected due process right to a neutral and detached adjudicator, Federal Court review should not be barred by *Rooker-Feldman* and the Circuit's decision conflicts with this Court's holding in *D.C. Court of Appeals v. Feldman,* that a litigant "[b]y failing to raise his [federal] claims in state court...may forfeit his right to obtain review of the state-court decision in any federal court...." *D.C. Court of Appeals v. Feldman*, 460 U.S. at 463, fn. 16.

This is an issue of exceptional importance requiring this Court's resolution, as the application of *Rooker-Feldman* appears to depend on whether the Federal claim raised was of a threshold constitutional right or was based upon some other claim to federal right, privilege or protection.

IV. This Court Should Resolve the Conflict Between the Ninth Circuit's Decision Herein and Prior Holdings of this Court

This Court's review is required to resolve the facial discrepancy between this Court's prior holdings in *Concrete*

Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, supra, and in *Ward v. Village of Monroeville,* supra, which hold that the right to a neutral and detached adjudicator is a threshold issue of due process which is incapable of being cured by appeal or trial de novo, and the ruling of the Ninth Circuit in the instant case that resolution of the Federal constitutional claims in the United States District Court violates the proscriptions of the *Rooker-Feldman Doctrine.*

CONCLUSION

The Petition for Writ of Certiorari should be granted. The majority opinion of the Ninth Circuit Panel conflicts with the holding of this Court in *City of Monroeville* and in *Concrete Pipe* and the holding of this court in *D.C. Court of Appeals v. Feldman,* itself. Moreover, the question as to whether the deprivation of a threshold and fundamental due process right to a neutral and detached adjudicator is barred by the *Rooker-Feldman Doctrine* is an important question of federal law which has not been, but which should be, decided by this court. The court should reverse the decision of the Ninth Circuit Panel for these reasons. Bianchi further requests that the Court grant this Petition and provide uniform guidance to the lower courts as to whether a threshold due process violation, which effectively bars a litigant from state court, is distinct from the underlying decision resolving the underlying appeal so as to allow consideration of Federal constitutional issues in the United States District Court.

Respectfully submitted,

SCOTT MICHAEL CANTOR, ESQ.
Counsel of Record
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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 00-55585

[Filed September 8, 2003]

MAURICE L. BIANCHI, f/d/b/a M. BIANCHI OF CALIFORNIA, Plaintiff-Appellant,	)
v.	)
WILLIAM F. RYLAARSDAM, DAVID G. SILLS and EDWARD J. WALLIN;, Defendants-Appellees,	)
BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, Real-Party-in-interest - Appellee.	)

On Appeal from the United States District Court
for the Central District of California, Santa Ana
D.C. No.CV-99-01236-AHS

Before: B. FLETCHER, D.W. NELSON, and McKEOWN, Circuit Judges.

ORDER

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-55585

[Filed June 27, 2003]

MAURICE L. BIANCHI, f/d/b/a M. BIANCHI OF CALIFORNIA,
Plaintiff-Appellant,

v.

WILLIAM F. RYLAARSDAM; DAVID G. SILLS; EDWARD J. WALLIN,
Defendants-Appellee.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION,
Real-party-in-interest-Appellee.

Appeal from the United States District Court
for the Central District of California
D.C. No. CV-99-01236-AHS
Alicemarie H. Stotler, District Judge, Presiding

Before: Betty B. Fletcher, Dorothy W. Nelson, and M. Margaret McKeown, Circuit Judges.

OPINION

McKEOWN, Circuit Judge:

At the heart of this case is a disappointed litigant's attempt to obtain in federal court the very relief denied to him in state court, namely an injunction vacating a decision by the California Court of Appeal and reassigning his case to a different division or district because of the alleged bias of one of the justices. Maurice L. Bianchi unsuccessfully presented his bias claim to the California state courts, citing both a California procedural statute and the state and federal constitutions. After losing on two separate occasions, he filed a federal civil rights suit, which, in this case, is the functional equivalent of an appeal of the state court decision. For us to entertain his challenge and grant relief would necessarily require us to review and invalidate the state court decision, a result that is inconsistent with the *Rooker-Feldman* doctrine. Under *Rooker-Feldman*, a federal district court is without subject matter jurisdiction to hear an appeal from the judgment of a state court. Thus, we affirm the district court's order dismissing Bianchi's complaint against the California Court of Appeal justices who adjudicated his appeal.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In the early 1990s, Bianchi commenced an action against Bank of America in the Superior Court of California (Orange County). Following a protracted trial, in which Judge Mason L. Fenton presided, the jury returned a verdict in favor of Bank of America on all of the claims asserted by Bianchi and

on Bank of America's counterclaim. Bianchi then filed a series of post-trial motions. During the post trial proceedings, Bank of America moved to disqualify Judge Fenton. Although he denied Bank of America's motion, Judge Fenton later recused himself voluntarily.

After the recusal, the case was transferred to then-Superior Court Judge William Rylaarsdam. Immediately upon reassignment and before any substantive proceedings took place, Bianchi's trial counsel took advantage of a statutory disqualification available under California Code of Civil Procedure § 170.6(2), resulting in the automatic disqualification of Judge Rylaarsdam.[1] A third judge subsequently denied Bianchi's post-trial motions. Bianchi then appealed to the Court of Appeal for the State of California, Fourth Appellate Division. Bianchi's appeal was assigned to a panel that included now-Justice Rylaarsdam, who had been elevated to the California Court of Appeal during the intervening years. The three-judge panel also included Justices David G. Sills and Edward J. Wallin.

For his appeal, Bianchi's appellate counsel compiled an excerpt of record that included documents reflecting Judge Rylaarsdam's disqualification in the trial court. Thus, at the time Bianchi's case was assigned to be heard before the appellate panel, Bianchi's counsel knew that Bianchi had previously used a "peremptory" challenge under § 170.6(2) to remove then-Judge Rylaarsdam from his case. Bianchi did not, however, bring this information to the court's attention

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[1] Under that provision, the movant must state generally that the judge should be disqualified on grounds of prejudice. Once the motion is made, the judge is automatically disqualified. See Cal. Civ. Proc. Code § 170.6(3). No assessment of prejudice is undertaken.

or file a motion to disqualify Justice Rylaarsdam at that time. Only after he lost his appeal did Bianchi object, via a Petition for Review to the California Supreme Court, to Justice Rylaarsdam's presence on the panel that decided his appeal. Without reaching the merits of Bianchi's argument, the California Supreme Court rejected Bianchi's Petition for Review as untimely.

With the direct review of his case apparently concluded, Bianchi then tried another tactic; he filed a motion before the California Court of Appeal to recall the remittitur, claiming that Justice Rylaarsdam's presence on the panel violated his federal and state constitutional right to due process and was contrary to California procedural rules. Through this motion, Bianchi sought to have the Court of Appeal vacate its opinion and reassign his appeal to a different panel. Justice Sills entered a summary order denying Bianchi's motion. Although Justice Sills did not reference the state or federal constitutional argument in his decision, nothing in the record suggests that the court neglected its responsibility to consider Bianchi's claims, including his constitutional challenge.

Not satisfied, Bianchi sought a Writ of Mandate from the California Supreme Court, again asserting that his due process rights were violated and again seeking to have the appellate court's opinion vacated and his appeal reassigned to a different panel. The California Supreme Court denied his petition.

Having lost before the state courts, Bianchi filed suit in federal court against the three appellate justices, once again claiming that his due process rights were violated and once again seeking to have the appellate court's opinion vacated and his appeal reassigned to a different panel. In his federal suit, filed pursuant to 42 U.S.C. §§ 1982 and 1988, Bianchi

sought a declaratory judgment that would "declare repugnant to the Constitution of the United States, the practice of a Judge previously disqualified from hearing a matter as a Trial Court Judge from sitting in judgment of the same matter as an Appellate Court judge." He also sought the issuance of a "mandatory injunction to require the Defendants to recall the Remittitur issued . . . and the resetting of that matter for argument and decision after transfer of that case to a different division or Appellate District of the Court of Appeal of the State of California."

Justices Sills, Wallin and Rylaarsdam moved to dismiss the complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the FEDERAL RULES OF CIVIL PROCEDURE and the *Rooker-Feldman* doctrine. They also moved to dismiss the complaint for failure to state a claim upon which relief could be granted, pursuant to Rule 12(b)(6). The district court granted the motion to dismiss based on *Rooker-Feldman*. We review de novo a dismissal for lack of subject matter jurisdiction. *See, e.g., La Reunion Francaise SA v. Barnes,* 247 F.3d 1022, 1024 (9th Cir. 2001).

DISCUSSION

In analyzing a *Rooker-Feldman* challenge, it is instructive to consider the Supreme Court's precise language that was the genesis of this doctrine. Although the principle that federal courts lack jurisdiction to hear appeals from state court decisions was firmly established in *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149 (1923), it was not until sixty years later, in *D.C. Court of Appeals v. Feldman,* 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983), that the now-familiar test was articulated:

> If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application [for relief], then the District Court is in essence being called upon to review the state court decision. This the District Court may not do.

Id. at 483 n.16.

> United States District Courts . . . do not have jurisdiction, however, over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional.

Id. at 486.

Rooker-Feldman is a powerful doctrine that prevents federal courts from second-guessing state court decisions by barring the lower federal courts from hearing de facto appeals from state-court judgments: If claims raised in the federal court action are "inextricably intertwined" with the state court's decision such that the adjudication of the federal claims would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules, then the federal complaint must be dismissed for lack of subject matter jurisdiction. *See Feldman,* 460 U.S. at 483 n.16 & 485. Simply put, "the United States District Court, as a court of original jurisdiction, has no authority to review the final determinations of a state court in judicial proceedings." *Worldwide Church of God v. McNair,* 805 F.2d 888, 890 (9th Cir. 1986).

With these principles in mind, we conclude that the district court lacks jurisdiction to consider Bianchi's claims. Far from bringing a general constitutional challenge that is not "inextricably intertwined" with the state court decision, Bianchi essentially asked the federal court to review the "state court's denial in a judicial proceeding," *Feldman,* 460 U.S. at 483 n.16, and to afford him the same individual remedy he was denied in state court. *See Craig v. State Bar of California,* 141 F.3d 1353, 1354-55 (9th Cir. 1998) (holding complaint did not raise a general challenge where the relief sought was individual in nature).

A comparison of Bianchi's pleadings in state court and federal court reveals that the constitutional claims and related claims in this federal suit are inextricably intertwined with the state court's denial of relief. In his state court Motion to Recall Remittitur and For Further Relief, Bianchi stated:

> To avoid infringement of Mr. Bianchi's due process rights and protections, this Court should recall its Remittitur, vacate the Opinion entered herein on or about May 23, 1997, assign this matter to hearing before the Court, *en banc*, or transfer the case to another District of the Court and allow the appeal to proceed as if the Opinion entered on or about May 23, 1997, had never been issued.

His federal complaint is a mirror image and seeks relief specific to his individual case:

> This action seeks a declaratory judgment declaring repugnant to the Constitution of the United States, the practice of a Judge previously disqualified from hearing a matter as a Trial Court Judge from sitting in judgment of the same matter as an Appellate Court

> Judge; and a mandatory injunction to require the Defendants to recall the Remittitur . . ., and the resetting of that matter for argument and decision after transfer of that case to a different division or Appellate District of the Court of Appeal of the State of California.

And finally, Bianchi's appellate brief in this court underscores that he seeks to overrule the state decision and to have this court order relief in the state action:

> Mr. Bianchi complained that his constitutionally protected right to Due Process and, specially, his right to have his claim adjudicated by an impartial tribunal, was violated by a Judge, previously disqualified, acting as the authoring Judge of the Opinion in the appeal from the same case in which the Judge had been disqualified below and that, to remedy the deprivation of Due Process, the Court should mandatorily enjoin the panel of the Court of Appeals to reassign the case to an impartial tribunal.

Bianchi now seeks an order from us instructing the state court to do what it refused to do when he made the identical claim before that court -- to reassign his case to a different panel of judges. It is difficult to imagine how any federal action could be more "inextricably intertwined" with a state court judgment than this proceeding. *See Phifer v. City of New York,* 289 F.3d 49, 55-56 (2nd Cir. 2002) (holding "if the precise claims raised in a state court proceeding are raised in the subsequent federal proceeding, *Rooker-Feldman* plainly will bar the action" (internal quotation marks omitted)).

Although Bianchi admits that he raised the same issues presented here in his motion to recall the remittitur and in his

petitions before the California Supreme Court, Bianchi asserts that his due process claim is not inextricably intertwined with his state court action because the substantive issues presented in his underlying state court complaint and his federal complaint are not the same. This argument misses the mark and blurs the distinction between the *Rooker-Feldman* doctrine and the principles of preclusion.[2]

As our sister circuits have observed, "we cannot simply compare the *issues* involved in the state-court proceeding to those raised in the federal-court plaintiff's complaint." *Kenman Eng'g v. City of Union*, 314 F.3d 468, 476 (10th Cir. 2002) (citing other circuits' authority in accord). Rather, under *Rooker-Feldman*, "we must pay close attention to the *relief* sought by the federal-court plaintiff." *Id.* Here, Bianchi seeks an order compelling the state court to recall its decision and reassign his case to be heard before a different panel of judges. *Rooker-Feldman* precludes adjudication of this claim because "the only redress [Bianchi seeks is] an 'undoing' of the prior state-court judgment -- a 'particularized challenge to an adjudication against him in state court' clearly barred under *Rooker-Feldman*."[3] *Id.* at 477 (quoting *Ritter v. Ross*,

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[2] *See GASH Associates v. Village of Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993) ("Both [*Rooker-Feldman* and preclusion] define the respect one court owes to an earlier judgment. But the two are not co-extensive.").

[3] Another way to look at Bianchi's claim -- and one that leads us to the same result -- is through the doctrine of standing. As the Tenth Circuit explained in *Facio v. Jones*, 929 F.2d 541, 543 (10th Cir. 1991), a constitutional challenge is "inextricably intertwined" with a request to set aside a state court judgment if the plaintiff would lack standing to bring the constitutional challenge on its own. Although Facio claimed, as Bianchi does here, that he was bringing

992 F.2d 750, 755 (7th Cir. 1993)).

Because we cannot grant the relief Bianchi seeks without "undoing" the decision of the state court, it is immaterial that the state courts did not specify the grounds on which they denied Bianchi's claims. The silence of the California courts does not indicate that they failed to consider the constitutional claims presented to them. *See Craig,* 141 F.3d at 1355 n.3 (applying *Rooker-Feldman* doctrine where California Supreme Court denied the petition for review without comment and without holding a hearing, concluding that "the fact that the California Supreme Court denied Craig's petition for review without comment does not mean that no adjudication occurred"). To conclude otherwise would require us to assume that the "state judges [were] not . . . faithful to their constitutional responsibilities." *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 611, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975).

In any event, Bianchi's claims would still be barred under *Rooker-Feldman* even if the state court had not actually decided his constitutional claims. The *Rooker-Feldman* doctrine does not require us to determine whether or not the state court fully and fairly adjudicated the constitutional claim. Nor is it relevant whether the state court's decision is res judicata or creates the law of the case under state law. *See Feldman,* 460 U.S. at 488 (recognizing distinction between *Rooker* and res judicata analysis); *Kenman,* 314 F.3d at 478-

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a general constitutional challenge, the Tenth Circuit rejected this argument, noting that "if Mr. Facio is not able to set aside the [state court judgment] against him, he would lack standing to assert his [constitutional] claim." *Id.* This is so, because unless the state court judgment is overturned, Facio's "only interest in [the state's] procedures is prospective and hypothetical in nature." *Id.* The same is true here.

79; *GASH Associates,* 995 F.2d at 728. Unlike res judicata, which requires courts to look to the preclusive effect of prior judgments under state law, *Rooker-Feldman* looks to federal law to determine "whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment."[4] *Garry v. Geils,* 82 F.3d 1362, 1365 (7th Cir. 1996). "If the injury alleged resulted from the state court judgment itself, *Rooker-Feldman* directs that the lower federal courts lack jurisdiction." *Id. Accord GASH Associates,* 995 F.2d at 728 (holding that *Rooker-Feldman* barred the action "because the plaintiffs' injury *stemmed from the state judgment* -- an erroneous judgment, perhaps, entered after procedures said to be unconstitutional, but a judgment nonetheless.") However, "if the injury alleged is distinct from [the state court's] judgment, i.e., the party maintains an injury apart from the loss in state court and not "inextricably intertwined" with the state judgment, . . . res judicata may apply, but *Rooker-Feldman* does not." *Garry,* 82 F.3d at 1365.

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[4] It is immaterial that Bianchi frames his federal complaint as a constitutional challenge to the state courts' decisions, rather than as a direct appeal of those decisions. The *Rooker-Feldman* doctrine prevents lower federal courts from exercising jurisdiction over any claim that is "inextricably intertwined" with the decision of a state court, even where the party does not directly challenge the merits of the state court's decision but rather brings an indirect challenge based on constitutional principles. *See Feldman,* 460 U.S. at 483. Thus, *Rooker-Feldman* bars federal adjudication of any suit in which a plaintiff alleges an injury based on a state court judgment and seeks relief from that judgment, not only direct appeals from a state court's decision. *See Garry,* 82 F.3d at 1365; *Kenman,* 314 F.3d at 475; *Hutcherson v. Lauderdale County,* 326 F.3d 747, 755 (6th Cir. 2003); *Howell v. Supreme Court of Texas,* 885 F.2d 308 (5th Cir. 1989).

Thus, unlike *res judicata*, the *Rooker-Feldman* doctrine is not limited to claims that were actually decided by the state courts, but rather it precludes review of all "state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *See Kenman,* 314 F.3d at 475 (quoting *Feldman,* 460 U.S. at 486). Stated plainly, "*Rooker-Feldman* bars any suit that seeks to disrupt or "undo" a prior state-court judgment, regardless of whether the state-court proceeding afforded the federal-court plaintiff a full and fair opportunity to litigate her claims."[5] *Id.* at 478 (citing *Facio,* 929 F.2d at 544).

Our conclusion parallels the Fifth Circuit's analysis in *Howell v. Supreme Court of Texas,* 885 F.2d 308 (5th Cir. 1989), a case that addressed a question very similar to that presented here. Howell appealed to the Texas Supreme Court

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[5] The suggestion in the concurrence that *Rooker* compels a different result is strained. In *Rooker*, the district court held that it did not have jurisdiction over any part of the suit presented to it, including the bias claim. The Supreme Court affirmed that decision in its entirety. 263 U.S. at 417. The Supreme Court did not state or imply that the district court had jurisdiction over the bias claim. To the contrary, the Court merely chastised Rooker's counsel for including the bias claim in the brief, noting that the "facts set forth and relied upon neither support nor tend to support the charge; and we experience difficulty in reconciling its presence in the bill with the care and good faith which should attend the preparation of such a pleading." *Id.* The Court then explicitly stated that the existence of this bias claim did not change its conclusion that the district court lacked jurisdiction to review Rooker's claim, explaining that "the [bias] charge does not change the nature of the bill or require that it be given any effect which it otherwise would not have." *Id.*

for a writ of error after receiving adverse rulings from both the state trial court and court of appeals. *Id.* at 309-10. Along with his application to the Texas Supreme Court, Howell filed a motion asserting that Texas Rules of Appellate Procedure and the Due Process Clause required the justices to recuse themselves, either because they "harbored a personal bias or prejudice toward" him or because "the impartiality of . . . [the] justices might reasonably be subject to question." *Id.* at 310 (internal quotation marks omitted).

After the Texas Supreme Court denied Howell's motion for recusal and denied his application for a writ of error, Howell filed a complaint in federal court in which he asserted that the justices' refusal to recuse themselves was a due process violation. *Id.* at 310-11. Noting that the bases for relief were the same as Howell asserted in state court, the district court dismissed the complaint for lack of jurisdiction. *Id.* at 311. The Fifth Circuit affirmed, explaining that Howell's due process argument "was explicit in [his] motion to recuse and was necessarily rejected by the justices in denying his motion." *Id.* at 312. "Because Howell did raise his claim in the state court, allowing a new challenge in federal district court would necessarily require review of a final state court judgment," a result prohibited by the *Rooker-Feldman* doctrine. *Id.* As the Fifth Circuit observed, "to permit such a challenge would be to permit the type of review the Supreme Court rejected in *Rooker, Atlantic Coast Line,* and *Feldman*." *Id.* at 313. The same reasoning applies here.

Our analysis also draws support from the principles of federalism and comity that underlie the *Rooker-Feldman*

doctrine.[6] It is difficult to imagine what remedy the district court could award in this case that would not eviscerate the state court's judgment. Bianchi wants a new hearing with a new panel of appellate justices -- and, of course, he wants a different result. We cannot fathom, however, how a federal court could order this relief and command a state court to satisfy Bianchi's demand. The integrity of the judicial process depends on federal courts respecting final state court judgments and rebuffing de facto appeals of those judgments to federal court. The practical consequences of adopting Bianchi's view would open Pandora's box and undermine the essence of the *Rooker-Feldman* doctrine.

AFFIRMED.

CONCUR: B. FLETCHER, Circuit Judge, concurring in the judgment:

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[6] We acknowledge that *Rooker-Feldman* is not a constitutional doctrine. *See In re Gruntz*, 202 F.3d 1074, 1078 (9th Cir. 2000) (en banc). Nonetheless, we invoke the terms "federalism" and "comity" to reflect the well-established understanding that the *Rooker-Feldman* doctrine is grounded in these principles. *See Lemonds v. St. Louis County*, 222 F.3d 488, 495 (8th Cir. 2000) ("*Rooker-Feldman* is . . . concerned with federalism and the proper delineation of the power of the lower federal courts."); *Kenman*, 314 F.3d at 479 (quoting *Lemonds*, 222 F.3d at 495); *Kropelnicki v. Siegel*, 290 F.3d 118, 128 (2d Cir. 2002) (explaining that the *Rooker-Feldman* doctrine is based on "comity" and "seeks to prevent state and federal courts . . . [from] fighting each other for control of a particular case" (alterations in original and internal quotation marks omitted)); *see also* Suzanna Sherry, *Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action*, 74 NOTRE DAME L. REV. 1085, 1101-02 (1999).

I write separately because the majority's expansive reasoning is irreconcilable with the Supreme Court's decision in *Rooker* and unnecessarily enunciates a doctrine of "appellate jurisdiction" for *Rooker-Feldman* purposes that, as I explain below, is unwarranted on the facts of this case. I concur in the judgment, however, because the record presents no affirmative evidence that the California Supreme Court's summary decision denying Bianchi's petition for a writ of mandate was not a decision on his federal due process claim. *See, e.g., Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415, 68 L. Ed. 362, 44 S. Ct. 149 (1923) ("If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction."); *General Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968, 968 (9th Cir. 1981) (federal courts are presumed to lack jurisdiction unless federal jurisdiction is shown affirmatively).

I analyze this case differently than the majority. Bianchi's federal court case alleges that the California Court of Appeal violated his federal constitutional right to due process because the judge who authored the court's disposition in his direct appeal was statutorily disqualified from the case as a trial judge for alleged bias. Bianchi took a number of steps to rectify the problem in California's state courts. First, he asked the California Supreme Court to review the decision. It declined, holding that the time for an appeal had passed. He then asked the panel of the Court of Appeal that decided his case to recall its remittitur and to transfer the case to a panel of the court that did not include a disqualified judge. One of the judges who had been on the allegedly tainted panel rejected Bianchi's request relying solely on state-law grounds. Finally, he petitioned the California Supreme Court for a writ of mandate to order the Court of Appeal to recall its

remittitur. The state Supreme Court denied Bianchi's petition without comment.

Regardless of how broadly the majority wishes the *Rooker-Feldman* doctrine to sweep, *Rooker* itself carved out a clear exception to the rule that the general jurisdictional statutes do not permit a lower federal court to adjudicate a federal-law claim that, if meritorious, overturns a state court's judgment. In *Rooker*, the Supreme Court noted that the plaintiff alleged that the state Supreme Court's judgment was void because one of the judges had an improper "interest in the case which worked his disqualification." *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416-17, 68 L. Ed. 362, 44 S. Ct. 149 (1923). Unlike the other claims in the case, the Supreme Court reached the merits of the judicial disqualification claim. The Court fully and extensively discussed the allegation of judicial bias. Only after concluding that the claim was without merit, did the Court dismiss the claim and hold that "the facts set forth and relied upon neither support nor tend to support the charge." *Id.* at 417. That the Court chose to chastise Rooker's counsel for bringing a baseless claim of judicial bias does not alter the fact that the Court plainly dismissed the charge only after considering it's merit; the Court's observation that "the charge does not change the nature of the bill or require that it be given any effect which it otherwise would not have," *id.*, must be read in light of the evaluation of the claim itself, which takes up almost a full third of the opinion in *Rooker*. The majority's opinion is wrong in asserting otherwise.

Because this aspect of *Rooker* has not been overruled, an attack on the authority of a state court to adjudicate a case because a state court judge should have been disqualified is not subject to dismissal under the *Rooker-Feldman* doctrine. Congress has not altered the jurisdictional statutes to abrogate

this aspect of *Rooker*. There is nothing in *D.C. Court of Appeals v. Feldman,* 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983), that overrules *Rooker* on this point -- *Rooker* is cited once in *Feldman*, and simply for the proposition that lower federal courts generally may not review state court judgments directly.[1] And none of the Supreme Court's other cases that discuss *Rooker* purports to overrule any aspect of it either. *See Verizon Maryland, Inc. v. Public Service Comm'n,* 535 U.S. 635, 152 L. Ed. 2d 871, 122 S. Ct. 1753; *City of Chicago v. International College of Surgeons,* 522 U.S. 156, 177, 139 L. Ed. 2d 525, 118 S. Ct. 523 (1997) (Ginsburg, J., dissenting); *Johnson v. De Grandy,* 512 U.S. 997, 1005-06, 129 L. Ed. 2d 775, 114 S. Ct. 2647 (1994); *Heck v. Humphrey,* 512 U.S. 477, 485-86, 129 L. Ed. 2d 383, 114 S. Ct. 2364 (1994); *Howlett ex rel. Howlett v. Rose,* 496 U.S. 356, 370 n.17, 110 L. Ed. 2d 332, 110 S. Ct. 2430 (1990); *Martin v. Wilks,* 490 U.S. 755, 783 n.21, 104 L. Ed. 2d 835, 109 S. Ct. 2180 (1989); *ASARCO Inc. v. Kadish,* 490 U.S. 605, 606-07, 622, 104 L. Ed. 2d 696, 109 S. Ct. 2037 (1989); *Teague v. Lane,* 489 U.S. 288, 309, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989); *Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 7-10, 95 L. Ed. 2d 1, 107 S. Ct. 1519 (1987); *id.* at 25 (Marshall, J., concurring in the judgment); *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 826-27, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1986); *Doe v. Delaware,* 450 U.S. 382, 386, 67 L. Ed. 2d 312, 101 S. Ct. 1495 (1981); *Florida State Bd. of Dentistry v. Mack,* 401 U.S. 960, 961, 28 L. Ed. 2d 245, 91 S. Ct. 971 (1971) (White, J., dissenting from denial of certiorari); *Fishgold v. Sullivan Drydock & Repair Corp.,*

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[1] Indeed, it would be extraordinary if *Feldman* even reached the issue of whether federal judicial disqualification claims against state judges are barred because the question of improper judicial bias was not presented in *Feldman*.

328 U.S. 275, 283, 90 L. Ed. 1230, 66 S. Ct. 1105 (1946). This court may not assume that the Supreme Court has abandoned its precedent without a plain signal from that court. *See Agostini v. Felton,* 521 U.S. 203, 237, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."). And in determining whether the Supreme Court has overruled itself, we may not rely on other lines of precedent from the Supreme Court. *See Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989).

Accordingly, if Bianchi had come directly to federal court in a § 1983 action to challenge the California Court of Appeal's disposition of his direct appeal, his claim could not be dismissed under *Rooker-Feldman*. Bianchi, however, did not come straight to federal court, but sought to vindicate his federal rights in state court. He sought relief from the same court that allegedly violated his rights, and he twice sought relief from the California Supreme Court.

Bianchi's attempt to have the Court of Appeal recall its remittitur does not bar his federal court suit under *Rooker-Feldman* for the simple reason that the Court of Appeal's denial of relief is allegedly tainted by judicial bias, just as was its initial disposition of his direct appeal.

However, Bianchi does not allege that the state Supreme Court's justices should have been recused.[2] Accordingly, the principle that a challenge to the jurisdiction of a state court to

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[2] In this, of course, Bianchi's case differs from that of Rooker. *See* 263 U.S. at 415-16.

conduct proceedings when its judges should have been recused for bias does not apply to the California Supreme Court's decisions in this case.

There is no doubt that Bianchi presented the substance of his federal due process claim regarding the Court of Appeal's disposition of his appeal to the state Supreme Court when he petitioned for a writ of mandate. Despite the state Supreme Court's summary dismissal of that petition, we assume that the state court considered the merits of Bianchi's federal claim since Bianchi presented no affirmative evidence to the contrary. *Cf. Michigan v. Long,* 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983) (Supreme Court assumes that a state court decision does not rest on an adequate, independent state ground absent a clear statement to the contrary); *but cf. Ylst v. Nunnemaker,* 501 U.S. 797, 115 L. Ed. 2d 706, 111 S. Ct. 2590 (1991) (federal court on habeas review looks through unreasoned state court decisions to the last reasoned decision to determine whether state courts ruled on federal or state grounds).

Regardless of how broad or narrow the circumstances in which adjudication by a lower federal court is an improper exercise of appellate jurisdiction for *Rooker-Feldman* purposes, it is plain that review by a federal district court of a state Supreme Court's decision on the merits of a federal issue raised and presumed decided by the state court (where no improper bias is asserted) is an exercise of appellate jurisdiction. As such, it is barred by the *Rooker-Feldman* doctrine, and that should end this court's analysis of Bianchi's case.[3]

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[3] Indeed, there is absolutely no need to announce any theory of improper federal "appellate jurisdiction" over the California Court of Appeal's decision in this case because Bianchi's petition to the

However the majority goes on to enunciate a sweeping doctrine of "appellate jurisdiction" for *Rooker-Feldman* purposes. The majority relies almost exclusively on analytically confused authority from other circuits to create a standardless test for improper "appellate jurisdiction" that takes into account the relief a plaintiff seeks in federal court, whether the plaintiff has standing to bring a constitutional challenge on its own, a new federal common law of res judicata that is unmoored from any congressional specification of the limits of preclusion doctrine,[4] and general considerations of comity and federalism. Moreover, in holding that it is irrelevant whether the state court affords a litigant a full and fair adjudication of federal claims, the majority plainly disregards the Supreme Court's language in *Rooker* that suggests, to the contrary, that the adequacy of the process afforded by state courts plays some role in whether federal court adjudication is barred as an impermissible

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California Supreme Court for a writ of mandate raised and is presumed to have decided the federal question presented here. The majority's analysis is flawed because it assumes that it is the Court of Appeal's decision that is before us, not the state Supreme Court's.

[4] Congress mandated that federal courts look to state preclusion law. It is not the force of state law that limits federal court consideration of claims that were decided in state courts. *See* 28 U.S.C. § 1738.

In this case, the defendants never raised -- and therefore waived -- any claim that Bianchi's claims were barred by res judicata or collateral estoppel. Nonetheless, it appears as though the majority has permitted the defendants a second bite at the proverbial apple by including some amorphous form of these preclusion defenses in its test to determine whether the federal court adjudication of Bianchi's case is an improper appeal of a state court decision.

appeal. *See Rooker,* 263 U.S. at 414 ("It affirmatively appears from the bill that the judgment was rendered in a cause wherein the circuit court had jurisdiction of both the subject-matter and the parties, that a full hearing was had therein, that the judgment was responsive to the issues."). The majority's disquisition does not resolve confusion about the proper application and scope of the *Rooker-Feldman* doctrine, but will leave litigants and our district courts, if anything, more confused.

In this case, we need not decide whether the correct yardstick by which to decide if a federal case is an improper appeal of a state court decision is the relief sought, the claims asserted, or the injury alleged. Those questions are simply not presented.

In sum, I conclude that Bianchi's case is barred because he seeks to have the federal district court overturn the California Supreme Court's decision on his federal due process claim. I do not agree that *Rooker-Feldman* would bar his claims had he come directly to federal court, and so am unable to concur in the majority's analysis. I respectfully concur only in the judgment.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. SA CV-99-1236 AHS (EEX)

[Filed March 20, 2000]

MAURICE L. BIANCHI, f/d/b/a M. BIANCHI OF CALIFORNIA,
Plaintiff,

v.

WILLIAM F. RYLAARSDAM, DAVID G. SILLS and EDWARD J. WALLIN, et al.,
Defendants.

BANK OF AMERICA TRUST & SAVINGS ASSOCIATION,

Real Party-In-Interest.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Plaintiff, MAURICE L. BIANCHI fdba M. BIANCHI OF CALIFORNIA, hereby appeals to the Ninth Circuit Court of Appeals from the Order entered on the Court's docket on or about February 25, 2000, granting the Defendants' Motion to Dismiss.

DATED this 13th of March, 2000.

GRAZIADEI & CANTOR, LTD.

BY: S/_____
SCOTT MICHAEL CANTOR, ESQ.
Nevada Bar No. 001713
GRAZIADEI & CANTOR, LTD.
302 E. Carson Ave., Suite 400
Las Vegas, Nevada 89101
(702) 477-7733
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **NOTICE OF APPEAL** was served by U.S. Mail this 13th day of March, 2000, upon the following:

KYUNGAH SUK, ESQ.
Deputy Attorney General
300 South Spring Street
Los Angeles, California 90013

ANNEMAIRE C. O'SHEA, ESQ.
Judicial Counsel of California
455 Golden Gate Avenue
San Francisco, California 94102-3660

KENNETH R. CHIATE, ESQ.
PATRICK G. ROGAN, ESQ.
725 South Figueroa Street, Suite 1200
Los Angeles, California 90017-5443

/s/_____
An employee of GRAZIADEI & CANTOR, LTD.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. SA CV-99-1236 AHS (EEX)

[Filed February 25, 2000]

MAURICE L. BIANCHI, f/d/b/a M. BIANCHI OF CALIFORNIA, Plaintiffs,	)
v.	)
WILLIAM F. RYLAARSDAM, DAVID G. SILLS AND EDWARD J. WALLIN, et al. Defendants.	)
BANK OF AMERICA TRUST & SAVINGS ASSOCIATION, Real Party-In-Interest.	)

ORDER

The motion of Defendants Judges William F. Rylaarsdam, David G. Sills, and Edward J. Wallin to dismiss the Complaint came before the above-entitled Court, Honorable Alicemarie Stotler presiding.

The Court, having received, read, and considered the pleadings and papers submitted by the parties rules that the Court does not have power to review state court judgments. Therefore, Defendant's Motion to Dismiss Complaint is granted and the action is dismissed. Because the ground for dismissal is not one that could be cured by amendment, the dismissal is with prejudice.

IT IS SO ORDERED.

Dated: February 25th, 2000.

/s/_____
ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

CIVIL MINUTES GENERAL

Case No. SA CV 99-1236 AHS (Eex)

Date February 25, 2000

Title Maurice L. Bianchi v. William F. Rylaarsdam, et al.

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DOCKET ENTRY

[I hereby certify that this document was served by first class mail or Government messenger service, postage prepaid, to all counsel (or parties) at their respective most recent address of record in this action on this date.]

Date._____ Deputy Clerk _____

==========

PRESENT:

HON. ALICEMARIE H. STOTLER, JUDGE

Debra Beard	Not Present
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

None Present

ATTORNEYS PRESENT FOR DEFENDANTS:

None Present

PROCEEDINGS: (In Chambers)

RULING GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT AND DISMISSING ACTION

On October 6, 1999, plaintiff filed a complaint seeking declaratory, injunctive and equitable relief based on an alleged violation of his constitutional right to due process of law. On January 25, 2000, defendants filed their motion to dismiss complaint. Real party in interest Bank of America Trust & Savings Association filed joinder to the motion to dismiss on February 2, 2000. On February 11, 2000, plaintiff filed opposition. Defendants filed their reply on February 22, 2000. The matter was noticed for hearing on the Court's February 28, 2000 calendar.

The Court, having received, read and considered the foregoing, finds the matter appropriate for submission on the papers without oral argument. See Local Rule 7.11 (the Court may dispense with oral argument on any matter unless otherwise required); Fed. R. Civ. P. 78. The matter is, therefore, removed from the Court's February 2000 calendar.

Defendants' motion to dismiss is granted on the grounds urged by defendants in their motion. In particular, the Rooker-Feldman doctrine bars consideration of plaintiff's claims, defendants are, on the facts alleged here, immune

from suit, and the statute of limitations has run. A review of the Complaint does not disclose that plaintiff alleges any knowledge by any of the defendants of the trial-level disqualification of defendant Rylaarsdam. According to the complaint, the trial court disqualification was effected by use of the so-called "peremptory"" challenge under Cal. Civ. Proc. § 170.6 which permits peremptory recusal, without specific cause, and requires assignment to another judicial officer for trial or hearing. No actual bias, either at the trial court or appellate level, is alleged. Cf., Cal. Civ. Proc. § 170.1. Adjudication in federal court of plaintiff's claims and prayers for relief is unsupported, unwarranted, and unjustified.

The court grants defendants' motion to dismiss the complaint. The action is therefore dismissed. The court has this date modified and signed defendants' proposed Order and filed it as the Order Granting Defendants' Motion to Dismiss Complaint; Dismissing Action.

The Clerk shall serve this minute order on counsel for all parties in this action and provide an advance copy by facsimile.

I HEREBY CERTIFY THAT THS DOCUMENT WAS SERVED BY FAX DELIVERY ON PLAINTIFF/DEFENDANT (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT FAX NUMBER OF RECORD IN THIS ACTION ON THIS DATE

2/25/00

/s/

DEPUTY CLERK

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. SA CV-99-1236 AHS (EEX)

[Filed October 6, 1999]

MAURICE L. BIANCHI, f/d/b/a M. BIANCHI OF CALIFORNIA,
Plaintiff,

v.

WILLIAM F. RYLAARSDAM, DAVID G. SILLS and EDWARD J. WALLIN, in their capacities as Judges of the Court of Appeal of the State of California, Fourth Appellate District, Division Three,
Defendants.

BANK OF AMERICA TRUST & SAVINGS ASSOCIATION,
Real Party-In-Interest.

COMPLAINT

COMES NOW, the Plaintiff, MAURICE L. BIANCHI, fdba M. BIANCHI OF CALIFORNIA, by and through his counsel, SCOTT MICHAEL CANTOR, ESQ., a member the law firm of GRAZIADEI & CANTOR, LTD., and complaining against the Defendants, the Honorable WILLIAM F. RYLAARSDAM, the Honorable DAVID G. SILLS, and the Honorable EDWARD J. WALLIN, in their capacities as Judges of the Court of Appeals for the State of California, Fourth Appellate District, Division Three, and the Real Party-In-Interest, Bank of America National Trust & Savings Association, alleges, as follows:

I.

STATEMENT AS TO JURISDICTION

1. This is a civil action seeking declaratory, injunctive and equitable relief. Plaintiff seeks an injunction against the deprivation under color of the law of the State of California of his rights, privileges and immunities under the United States Constitution. Jurisdiction is invoked pursuant to 28 U.S.C. §§1343, 2201, 2202; 42 U.S.C. §§1983 and 1988 and the Constitution of the United States and, more particularly, the Fifth and Fourteenth Amendments thereto. This action seeks a declaratory judgment declaring repugnant to the Constitution of the United States, the practice of a Judge previously disqualified from hearing a matter as a Trial Court Judge from sitting in judgment of the same matter as an Appellate Court Judge; and a mandatory injunction to require the Defendants to recall the Remittitur issued in the matter captioned, "Bank of America National Trust & Savings Association, Respondent, vs. Maurice L. Bianchi fdba M. Bianchi of California, Appellant, Court of Appeal for the

State of California, Fourth Appellate District Case No. G014893", and the resetting of that matter for argument and decision after transfer of that case to a different division or Appellate District of the Court of Appeal of the State of California.

II.

VENUE

2. Venue is proper pursuant to 28 U.S.C. §§1391 and 1392.

III.

PARTIES

3. Plaintiff, Maurice L. Bianchi, is an individual presently residing in the District of Nevada who, at times relevant hereto, was a resident of the Central District of California, wherein he engaged in business under the fictitious firm name of M. Bianchi of California. At times relevant, Bianchi was a litigant before the United States Court of Appeals for the State of California, Fourth Appellate District, Division Three, in a matter captioned, "Bank of America National Trust & Savings Association, Appellant/Cross-Appellee, vs. Maurice L. Bianchi, Appellee/Cross-Appellant, Court of Appeal of the State of California, Fourth Appellate District, Case No. G014893." In that appeal, Bianchi as Cross-Appellant, sought a decision of the Court of Appeal of the State of California reversing a judgment entered upon a special jury verdict arising out of a civil action brought by Bianchi against Bank of America in the Superior Court of the State of California in and for the County of Orange (hereinafter the "Superior Court").

4. Each of the individual Defendants named herein is sued in his capacity as a duly qualified and sitting Judge of the Court of Appeal of the State of California, Fourth Appellate District, sitting as Division Three of that Court.

5. That while a Judge of the Superior Court the Defendant, the Honorable William F. Rylaarsdam, was assigned Bianchi's Superior Court case from which the subject Court appeal arose. However, the said Defendant was previously disqualified from sitting as a Judge in the said Superior Court action upon the filing of an Affidavit of Prejudice pursuant to California Code of Civil Procedure 170.6 and was disqualified, accordingly.

6. Each and all of the acts of Defendants alleged herein were done by Defendants, and each of them, not as individuals, but under the color and pretense of the statutes, ordinances, regulations, customs and usages of the State of California and the Rules of the Court of Appeal of the State of California and under the authority of their offices as Judges of the said Court.

7. That Bank of America National Trust & Savings Association, is and, at all times relevant hereto, was the Appellant/Cross-Appellee in Court of Appeal Case number G014893 and is a real party-in-interest herein.

III.

GENERAL AND SPECIFC ALLEGATIONS

8. That on or about October 7, 1993, Plaintiff brought a Cross-Appeal before the Court of Appeal of the State of California from a judgment upon a jury verdict resulting from a seven-month civil jury trial in the Superior Court for the

State of California, in and for the County of Orange, in the case of "Maurice Bianchi vs. Bank of America," bearing Superior Court Case No. 544621.

9. That the Defendants, Judges Rylaarsdam, Wallin and Sills, were assigned as the Panel of the Court of Appeal, District Four, to consider and decide that appeal.

10. That in the Superior Court, the underlying case was tried before a jury empaneled in the Court of the Honorable Mason L. Fenton. After approximately ninety days of testimony taken over a period of seven months, the Honorable Judge Fenton instructed the jury, the jury deliberated and returned with a verdict in favor of Bank of America, and against the Plaintiff herein, Maurice Bianchi, on Mr. Bianchi's Complaint, and against Bianchi and in favor of Bank of America on the latter's Crossclaim.

11. That subsequent to the rendition of the jury verdict, post-trial motions were filed. Prior to the Court ruling upon those motions, the Honorable Judge Fenton recused himself, after first denying a Motion brought by Bank of America to force his disqualification.

12. That upon Judge Fenton's recusal, the case was assigned to the Honorable William F. Rylaarsdam, then a Judge of the Superior Court.

13. That on or about August 4, 1993, Plaintiff's trial counsel brought a "Motion for Peremptory Disqualification; Declaration re: Prejudice," seeking the disqualification of the Honorable William F. Rylaarsdam upon the grounds that the said Judge was biased in favor of the Bank of America or against the interests of Mr. Bianchi.

14. That pursuant to the procedure established by California Code of Civil Procedure (CCP) 170.6(2), the Honorable Judge Rylaarsdam, on August 4, 1993, was disqualified from acting in the case, including all post-trial matters, as referenced by the Minutes of the Superior Court dated August 12, 1993.

15. That upon the disqualification of Defendant, Rylaarsdam, the matter was then assigned to the Honorable Donald E. Smallwood, a Judge of the Superior Court, who denied the Motions for New Trial and for Judgment Not Withstanding the Verdict.

16. That on or about September 20, 1993, Bank of America filed a Notice of Appeal of a portion of the Superior Court judgment and orders finding it to have acted in bad-faith; on or about October 7, 1993, Plaintiff herein, Bianchi, cross-appealed from the jury verdict against him on his Complaint and in favor of Bank of America on the latter's Crossclaim.

17. That subsequent to conclusion of the proceedings at the trial Court level, Plaintiff retained new counsel for purposes of the appeal. On or about February 10, 1997, appellate counsel received notice that the matter was set for argument before a three Judge Panel of the Court of Appeal of the State of California. The notice indicated that the Honorable Judges Sills, Wallin and Rylaarsdam constituted the Panel of the Court assigned to hear argument and decide the case. However, appellate counsel was not trial counsel, the record of the case was massive and appellate counsel did not notice the previous disqualification of Judge Rylaarsdam, as that fact was not in any way germane to the issues on appeal.

18. That although Defendant Rylaarsdam had been disqualified from sitting in Mr. Bianchi's case at the Superior Court while a Judge of that Court, he did not recuse himself from sitting on the appeal of the same case, nor did he bring the fact of his previous disqualification to the attention of the Court of Appeal or to the parties. Moreover, the Honorable Judge Rylaarsdam was assigned the duty of authoring the Court's opinion in the matter on appeal. Accordingly, Defendant Rylaarsdam was an active participant in the questioning of counsel at oral argument and, in fact, authored the Court's Opinion, deciding the appeal against the interests of Mr. Bianchi and in favor of Bank of America.

19. Plaintiff, Maurice Bianchi, himself, was ignorant of the identity of Judge Rylaarsdam as being a Judge once disqualified at the Superior Court level. Plaintiff herein attended oral argument at the Court of Appeal, did not recognize Judge Rylaarsdam by name and, after the Opinion was rendered in the case, reviewed his files and spoke with one of his trial counsel, who recognized and advised Plaintiff that Judge Rylaarsdam had been disqualified from Plaintiff's case while a Superior Court Judge.

20. California Code of Civil Procedure 170 provides that a Judge has a duty to decide any proceeding in which he or she is not disqualified; pursuant to CCP 170.1(b), a judge before whom a proceeding was tried or heard shall be disqualified from participating in any appellate review of that proceeding.

21. That accordingly, on or about July 23, 1997, Plaintiff filed a Petition pursuant to the Rules on Appeal of the Court of Appeal of the State of California, Rule 28(a)(1), for a review of the Decision of the Court of Appeal, before the Supreme Court of the State of California. The Supreme Court

of the State of California returned that Petition as being untimely.

22. That based upon the discovery of Defendant, Rylaarsdam's, previous disqualification, Plaintiff brought a Motion before the Court of Appeal for the State of California, Fourth Appellate District, Division Three, to recall the Remittitur and for further relief. The further relief sought was the reassignment of the case to a different Panel of the Fourth Appellate District or for transfer of the case to a different Appellate District of the Court of Appeal of the State of California.

23. The Motion to Recall Remittitur and for Further Relief was not decided by the Chief Judge of the Fourth Appellate District but by Defendant, Sills, the presiding Judge of Division Three, the Panel deciding the underlying appeal, which consisted of Defendants, Sills, Wallin and Rylaarsdam.

24. That by Order entered May 7, 1998, Judge Sills denied Plaintiff's Motion to Recall Remittitur and for Further Relief.

25. That the Order of May 7, 1998, denying the Motion to Recall Remittitur and for Further Relief effectively denied Plaintiff of his right to Due Process under the California Constitution, Article I, Section 7, and under the Fifth and Fourteenth Amendments to the Constitution of the United States, in that the decision allowed to stand the Decision of the Court of Appeal decided, in part, and authored by a Judge who had been disqualified from sitting in the very same case while it was pending at the lower, trial Court.

26. That subsequent to the post-decision proceedings in the Court of Appeal, Plaintiff discovered that Defendant,

Rylaarsdam, sat as an advisor to a Committee of the State Bar of California and that a member of that Committee was an attorney with the law firm representing Bank of America in the underlying Superior Court and Court of Appeal proceedings. That fact was not disclosed to the Court or to the parties at any time.

27. That on or about April 12, 1999, Plaintiff brought a Petition for Writ of Mandate to the Supreme Court of the State of California, seeking a Writ of Mandate requiring the Court of Appeal for the State of California, Fourth Appellate District, Division Three, to recall the Remittitur, to reassign the case to a different Division or different Appellate District of the Court of Appeal and for oral argument and decision before an impartial Appellate Panel. On or about May 26, 1999, the California Supreme Court, without explanation, denied the Petition for Writ of Mandate.

28. That by reason of the conduct of the Defendants, and each of them, including that of a Judge once disqualified at the trial level from sitting in judgment upon the appeal of the very matter from which he was disqualified, Plaintiff was denied his right to Due Process as guaranteed to him by the Fifth Amendment of the United States Constitution as it is made applicable to the State of California by the Fourteenth Amendment to the United States Constitution.

29. The conduct of the Defendants, and each of them, deprived Plaintiff of the following rights, privileges and immunities secured to him by the Constitution of the United States:

a) The right to procedural Due Process of law;

b) The right to substantive Due Process of the law;

c) The right to have his controversy heard and decided by impartial, unbiased Judges of the Courts of the State of California.

30. Plaintiff incurred reasonable attorneys' fees in connection with his efforts to cause recall of the Remittitur before the Court of Appeal of the State of California, in bringing his Petition for Writ of Mandate to the California Court of Appeal and in the necessity of bringing this instant action to address the deprivation of his rights under color of authority pursuant to 42 U.S.C. §1983. Therefore, pursuant to the provisions of 42 U.S.C. §1988, Plaintiff is entitled to attorneys' fees as part of the costs of vindicating his Constitutional rights, privileges and immunities.

31. The refusal of Defendants to recall the Remittitur, to vacate the Opinion authored by Defendant, Rylaarsdam, and to reassign the matter for hearing before a different Division or Appellate District of the Court of Appeal, was arbitrary and capricious and constituted a deprivation of Plaintiff's rights to Due Process guaranteed to him by the Fifth and Fourteenth Amendments to the Constitution of the United States, and further deprived Plaintiff of a hearing before an impartial Panel of the Court of Appeal.

32. Because of the unconstitutional action of the individual Defendants, and each of them, Plaintiff is suffering irreparable injury.

WHEREFORE, Plaintiff demands judgment:

a) Declaring that the actions of an Appellate Court Judge, who was once disqualified from the same matter at the inferior Court, in sitting in judgment upon the appeal of the Decision from which he was disqualified, in his failure to

disclose the fact of that prior disqualification and in his participation in the decision and in authoring the Opinion on the appeal from the case from which he was disqualified, are unconstitutional;

b) Issuing a preliminary and permanent injunction mandating Defendants to recall the Remittitur of Plaintiff's appeal in State of California, Fourth Appellate District, Case No. G014893, vacating the Decision authored by Defendant, Rylaarsdam, and transferring the case for re-argument and decision before a different Appellate Division or different Appellate District of the Court of Appeal of the State of California;

c) Granting Plaintiff all costs of this action, including reasonable attorneys' fees incurred by Plaintiff; and

d) Granting Plaintiff such other and further relief as may be just and proper in the premises.

DATED this 21st day of September, 1999.

Respectfully submitted,

GRAZIADEI & CANTOR, LTD.

/s/_____
SCOTT MICHAEL CANTOR, ESQ.
California Bar No. 79851
302 East Carson Avenue
Suite 400
Las Vegas, Nevada 89101
(702) 477-7733
Attorney for Plaintiff
MAURICE BIANCHI

VERIFICATION

STATE OF NEVADA)
SS:)
COUNTY OF CLARK)

MAURICE BIANCHI, being first duly sworn, deposes and says :

That he is the Plaintiff in the foregoing action; that he has read the foregoing Complaint and knows the contents thereof; that the same are true of his own knowledge, except as to those matters which are therein alleged upon information and belief and, as to those matters, he believes them to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on this 21st day of September, 1999.

/s/_____
MAURICE BIANCHI

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. SA CV 99-1236 AHS (EEX)

[Filed January 25, 2000]

MAURICE L. BIANCHI f/d/b/a M. BIANCHI OF CALIFORNIA, Plaintiffs,	)
v.	)
WILLIAM F. RYLAARSDAM, DAVID G. SILLS AND EDWARD J. WALLIN, et al. Defendants.	)
BANK OF AMERICA TRUST & SAVINGS ASSOCIATION, Real Party- In- Interest.	)

NOTICE OF MOTION TO DISMISS COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Time: 10:00 a.m.
Dept: 10-A Judge: Alicemarie H. Stotler

TO PLAINTIFF MAURICE L. BIANCHI, and HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Monday, February 28, 2000 at 10:00 a.m. in Courtroom 10A of the Federal District Court at 411 West Fourth Street, Santa Ana, California, Defendants Judges William F. Rylaarsdam, David G. Sills, and Edward J. Wallin will move the court pursuant to Federal Rules of Civil Procedure 12(b) (1) and 12(b) (6) to dismiss the Complaint on the following grounds:

1. Federal district courts lack subject matter jurisdiction to review state court decisions pursuant to the Rooker-Feldman Doctrine. Such federal court review is limited to the United States Supreme Court.

2. Plaintiff fails to state a claim upon which relief can be granted because his claim is barred by the Eleventh Amendment.

3. Plaintiff fails to state a claim upon which relief can be granted because his claims under 42 U.S.C. § 1983 are barred by the one year statute of limitations.

This motion is made following the conference of counsels pursuant to Local Rule 7.4.1 which took place on December 6, 1999.

The motion will be based on the Complaint, the accompanying memorandum of points and authorities, and other papers on file herein.

Dated: January 25, 2000

Respectfully submitted,

BILL LOCKYER, Attorney General
of the State of California
MANUEL MEDEIROS,
Senior Assistant Attorney General
CHRISTOPHER FOLEY,
Supervising Deputy Attorney General

By /s/_____

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Attorneys for Defendants
Honorable William F. Rylaarsdam,
Honorable David G. Sills,
and Honorable Edward J. Wallin

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT

INTRODUCTION

In his Complaint, Plaintiff Maurice L. Bianchi, ("Plaintiff" or "Bianchi") brings a civil rights action under 42 U.S.C. § 1983 against Defendants Judge William F. Rylaarsdam ("Judge Rylaarsdam"), Judge David G. Sills ("Judge Sills"), and Judge Edward J. Wallin ("Judge Wallin") in their official capacities for alleged violations of his rights under the Fifth and Fourteenth Amendments of the Constitution of the United States.

Plaintiff seeks a declaratory judgment declaring repugnant to the Constitution of the United States, the practice of a state judge previously disqualified from hearing a matter as a trial court judge from sitting in judgment of the same matter as a state appellate court judge and an injunction to require the Defendants to recall the Remittitur issued in the matter captioned, "Bank of America National Trust & Savings Association, Respondent v. Maurice L. Bianchi, fdba M. Bianchi of California, Appellant, Court of Appeal for the State of California, Fourth Appellate District Case No. G014893" and resetting that matter for argument and decision after transfer of that case to a different division or Appellate District of the Court of Appeal of the State of California.

Defendants request that the Motion to Dismiss Complaint be granted because this court lacks subject-matter jurisdiction under the Rooker-Feldman doctrine to review state court decisions. Further, a claim that state officials violated state law is barred by the Eleventh Amendment. Finally, Plaintiff's

claims under 42 U.S.C. § 1983 are barred by the one year statute of limitations.

STATEMENT OF FACTS

The gravamen of Plaintiff's Complaint is that a verdict was rendered against him in a civil jury trial case titled *Maurice Bianchi v. Bank of America,* Orange County Superior Court Case No. 544621. *(Compl.* ¶ 8, p.4). This state court action was tried before a jury empaneled in the courtroom of Judge Mason L. Fenton ("Judge Fenton"). *(Compl.* ¶ 10, p.4). A jury verdict was returned in favor of Bank of America and against Bianchi on Bianchi's Complaint, and against Bianchi and in favor of Bank of America on the latter's Crossclaim. *(Compl.* ¶ 10, p.4). Subsequent to the adverse jury verdict, post-trial motions were filed. *(Compl.* ¶ 11, p.5). Prior to ruling on those motions, Judge Fenton recused himself. *(Compl.* ¶ 11, p.5).

Upon Judge Fenton's recusal, the case was assigned to Defendant Judge Rylaarsdam, then a Judge of the California Superior Court. *(Compl.* ¶ 12, p.5). On or about August 4, 1993, Plaintiff's trial counsel brought a "Motion for Peremptory Disqualification; Declaration re: Prejudice," pursuant to California Code of Civil Procedure § 170.6(2) to disqualify Defendant Judge Rylaarsdam on the grounds that he was biased in favor of Bank of America or against the interest of Bianchi. *(Compl.* ¶¶ 13-14, p.5). Defendant Judge Rylaarsdam was disqualified from acting in the case. *(Compl.* ¶ 14, p.5).

After Defendant Judge Rylaarsdam's disqualification, the matter was assigned to Judge Donald E. Smallwood, who denied the Motions for New Trial and for Judgment Not Withstanding the Verdict. *(Compl.* ¶ 15, pp.5-6).

On or about September 20, 1993, Bank of America filed a Notice of Appeal on a portion of the trial court judgment and on or about October 7, 1993, Plaintiff Bianchi, cross-appealed from the jury verdict against him on his Complaint and in favor of Bank of America on the latter's Crossclaim. *(Compl.* ¶ 16, p.6). Plaintiff retained new counsel for purposes of the appeal. *(Compl.* ¶ 17, p.6).

On or about February 10, 1997, Plaintiff was notified that the appeal was set for argument before Defendants Judges Sills, Wallin and Rylaarsdam of the Court of Appeal of the State of California. *(Compl.* ¶ 17, p.6). Plaintiff's appellate counsel did not notice the previous disqualification of Defendant Judge Rylaarsdam. *(Compl.* ¶ 17, p.6). The California Court of Appeal decided against the interests of Plaintiff Bianchi and in favor of Bank of America. *(Compl.* ¶ 18, pp.6-7).

After the decision, Plaintiff spoke with one of his trial counsel who recognized and advised Plaintiff that Defendant Judge Rylaarsdam had been disqualified from Plaintiff's case while a superior court judge. *(Compl.* ¶ 19, p.7). Accordingly on or about July 23, 1997, Plaintiff Bianchi filed a Petition for Review before the Supreme Court of the State of California. *(Compl.* ¶ 21, p.7). The California Supreme Court returned the Petition for Review for being untimely. *(Compl.* ¶ 21, p.7).

Based on the discovery of Defendant Judge Rylaarsdam's previous disqualification, Plaintiff Bianchi brought a Motion to Recall Remittitur and for Further Relief, before the Court of Appeal for the State of California, Fourth Appellate District, Division Three. *(Compl.* ¶ 22, pp.7-8). The further relief sought was the reassignment of the case to a different panel of the Fourth Appellate District or for transfer of the

case to a different Appellate District of the Court of Appeal of the State of California. *(Compl.* ¶ 22, pp.7-8). On May 7, 1998, the Motion to Recall Remittitur and for Further Relief was denied by Defendant Judge Sills *(Compl.* ¶ 24, p.8).

On April 12, 1999, Plaintiff brought a Petition for Writ of Mandate before the California Supreme Court seeking a Writ of Mandate to require the Court of Appeal for the State of California, Fourth Appellate District, Division Three, to recall the Remittitur, to reassign the case to a different Division or different Appellate District of the Court of Appeal and for oral argument and decision before an impartial Appellate Panel. On or about May 26, 1999, the California Supreme Court denied the Petition for Writ of Mandate. *(Compl.* ¶ 27, p.9).

ARGUMENT

I.

PLAINTIFF'S CLAIM SHOULD BE DISMISSED PURSUANT TO FRCP 12 (b)(1) FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFF'S CLAIM IS BARRED BY THE ROOKER-FELDMAN DOCTRINE.

Plaintiff in essence requests this court to review the California Supreme Court's decision to deny Plaintiff's Petition for Writ of Mandate to have his underlying state action heard before another panel of the California Court of Appeal. Federal district courts are courts of original jurisdiction and they may not serve as appellate tribunals to review the errors allegedly committed by state courts. *Atlantic Coast Line R. Co. v. Bhd. Of Locomotive Engineers,* 398 U.S. 281, 296 (1970). In what has become known as the

Rooker-Feldman doctrine, the United States Supreme Court proclaimed that federal district courts lack jurisdiction to review decisions of state courts. *See Dist. Of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 476 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 415 (1923). The district court lacks subject matter jurisdiction either to conduct a direct review of state court judgment or to scrutinize the state court's application of various rules and procedures pertaining to the state case. *Allah v. Superior Court of State of California, 871 F.2d 887, 891* (9th Cir. 1989). Federal district courts do not have jurisdiction even if the challenges to a state court decision allege that the state court's action was unconstitutional. *Feldman,* 460 U.S. at 486.

Plaintiff Bianchi's section 1983 claim amounts to nothing more than an impermissible collateral attack on a prior state court decision. Here, Bianchi seeks an "injunction mandating Defendants to recall the Remittitur of Plaintiff's appeal in State of California, Fourth Appellate District, Case No. G014893, vacating the Decision authored by Defendant, Rylaarsdam, and transferring the case for re-argument and decision before a different Appellate Division or different Appellate District of the Court of Appeal of the State of California." Plaintiff previously brought a Petition for Writ of Mandate before the California Supreme Court seeking the same relief. *(Compl.* ¶ 27, p.9). The California Supreme Court denied the Petition. Plaintiff now basically seeks review of the California Supreme Court's decision in federal district court. Plainly, the federal district court does not have jurisdiction to review the California Supreme Court's decision.

Plaintiff also seeks a declaratory judgment "declaring that the actions of an Appellate Court Judge, who was once disqualified from the same matter at the inferior court, in

sitting in judgment upon the appeal of the Decision from which he was disqualified, in his failure to disclose the fact of that prior disqualification and in his participation in the decision and in authoring the Opinion on the appeal from the case from which he was disqualified, are unconstitutional." (*Compl.* pp.1011). A district court engages in impermissible appellate review when it hears claims that are "inextricably intertwined" with the state court decision. "[T]he federal claim is 'inextricably intertwined' with the state court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Feldman,* 460 U.S. 483-484.

Plaintiff's claim for declaratory judgment is inextricably intertwined with the state court judgment to deny the Petition for Writ of Mandate. Plaintiff sought the Mandate to have his underlying case heard before another panel of the California Court of Appeal because Defendant Judge Rylaarsdam who was disqualified to hear the underlying case at the trial level had sat in judgment upon its appeal. Plaintiff's claim for declaratory judgment is inextricably intertwined with the state court judgment since his federal claim would succeed only if the state court wrongly decided the decision to deny the Petition for Writ of Mandate to have the underlying case heard before another panel. Since, a district court cannot hear claims that are inextricably intertwined with state court decisions, Defendants' Motion to Dismiss should be granted for lack of subject matter jurisdiction under the Rooker-Feldman Doctrine.

II.

PLAINTIFF'S CLAIM SHOULD BE DISMISSED UNDER FRCP 12 (b)(6) FOR FAILURE TO STATE A CLAIM BECAUSE PLAINTIFF'S CLAIM IS BARRED BY THE ELEVENTH AMENDMENT.

Plaintiff's section 1983 claim is nothing more then an attempt to seek relief against state officials for violation of a state law. Despite Plaintiff's protests of federal due process violations, his main claim is that Defendants allegedly violated California Code of Civil Procedure section 170.1(b), that a judge before whom a proceeding was tried or heard shall be disqualified from participating in any appellate review of that proceeding. (*Compl.* ¶ 20.)

A claim that state officials violated state law in carrying out their official responsibilities, however, is barred by the Eleventh Amendment, regardless of the relief sought. *See Pennhurst State School & Hospital,* 465 U.S. 89, 106 (1984); *Voigt v. Savell,* 70 F.3d 1552, 1563 (9th Cir. 1995), *cert. denied,* 517 U.S. 1209 (1996). Thus, Plaintiff's claim is also barred by the Eleventh Amendment.

III.

PLAINTIFF'S SECTION 1983 CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS.

The statute of limitations for claims brought under 42 U.S.C. §1983 is one year. *McDougal v. County of Imperial,* 942 F.2d 668, 673-74 (9th Cir. 1991). Plaintiff's Complaint does not state exactly when Plaintiff Bianchi became aware of Defendant Judge Rylaarsdam's previous disqualification. However, the Complaint does state that Plaintiff filed a

Petition for Review before the California Supreme Court on or about July 23, 1997 after finding out that Judge Rylaarsdam had been disqualified as a Superior Court Judge. The Petition was returned as untimely. *(Compl.* §§ 19-21, p. 7). Thereafter, Plaintiff attempted to bring a Motion before the Court of Appeal for the State of California, Fourth Appellate District, Division Three, to recall the Remittitur and for further relief. This Motion was denied on May 7, 1998. (*Compl.*¶ 25, p.8). Thus, it is clear that Plaintiff Bianchi was aware of his alleged civil rights violations since before July 23, 1997.

Plaintiff Bianchi did not file the instant action until October 6, 1999, well after the one year statute of limitations for section 1983 claims lapsed. Thus, plaintiff's claims under section 1983 are barred by the statute of limitations and defendants' Motion to Dismiss Complaint should be granted.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Motion to Dismiss Complaint be granted.

Dated: January 25, 2000

Respectfully submitted,
BILL LOCKYER,
Attorney General
of the State of California
MANUEL MEDEIROS,
Senior Assistant Attorney General
CHRISTOPHER FOLEY,
Supervising Deputy Attorney General

By /s/_____

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Attorneys for Defendants
Judges William F. Rylaarsdam,
David G. Sills, and
Edward J. Wallin

PROOF OF SERVICE

Case Name: **Maurice L. Bianchi v. William F. Rylaarsdam, et al.**
Case Number: **SA CV-99-1236 AHS (EEX)**

I declare that:

I am over the age of eighteen years and not a party to the above-entitled case. My business address is 300 South Spring Street, Suite 5212, in the County and City of Los Angeles, California 90013-1233.

I am readily familiar with the practice at my place of business for the collection and processing of correspondence for mailing with the United States Postal Service and that correspondence is deposited with the United States Postal Service on the same day, with postage fully prepaid, in the ordinary course of business.

On January 25, 2000, I served the attached

NOTICE OF MOTION TO DISMISS COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; PROPOSED ORDER; NOTICE OF INTERESTED PARTIES

by placing a true copy thereof in a sealed envelope for collection and mailing with the United States Postal Service in the ordinary course of the above addressed business, addressed as follows:

Scott Michael Cantor, Esq.
GRAZIADEI & CANTOR, LTD.
302 E. Carson Avenue, Ste. 400
Las Vegas, Nevada 89101

Annemarie C. O'Shea
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102-3660

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at Los Angeles, California, on January 25, 2000.

LAVON TENNISON (Typed Name)

/s/_____ (Signature)

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. SA CV-99-1236

[Filed Feb. 11, 2000]

MAURICE L. BIANCHI, f/d/b/a M. BIANCHI OF CALIFORNIA, Plainitff,	)
vs.	)
WILLIAM F. RYLAARSDAM, DAVID G. SILLS and EDWARD J. WALLIN, et al., Defendants	)
BANK OR AMERICA TRUST & SAVINGS ASSOCIATION, Real Party-In-Interest.	)

PLAINTIFFS' OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS

Date of Hearing: 2-28-2000
Time of Hearing: 10:00 a.m.
Judge: Honorable Stotler

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

COMES NOW, the Plaintiff, MAURICE BIANCHI, fdba M. BIANCHI OF CALIFORNIA, by and through his counsel, SCOTT MICHAEL CANTOR, ESQ. of GRAZIADEI & CANTOR, LTD., and submits his Opposition to the Defendant's Motion to Dismiss.

DATED this 8th day of February, 2000.

Respectfully sumbitted,

GRAZIADEI & CANTOR, LTD.

BY: /s/_____
SCOTT MICHAEL CANTOR, ESQ.
302 E. Carson Avenue, Suite 400
Las Vegas, Nevada 89101
California Bar No. 79851
Attorneys for Plaintiff
MAURICE BIANCHI

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS

I.

INTRODUCTION

Plaintiff, Maurice L. Bianchi, filed the instant Complaint pursuant to the terms of 42 U.S.C. 1983, seeking prospective injunctive relief to remedy a deprivation of his Federal Due Process rights by State judicial officers acting in their official capacities. Nevertheless, the Defendants have erroneously characterized Mr. Bianchi's action as an attempt to seek appellate review of substantive state Court decisions and, upon that erroneous characterization, seek dismissal of the Complaint. However, Mr. Bianchi's Complaint seeks no such relief.

As appears by the following Points and Authorities, Mr. Bianchi's cause of action has been recognized both at common law and under 42 U.S.C. 1983, and similar efforts to employ the Federal Courts to provide prospective injunctive relief against actions of state judicial officers who have deprived litigants of their Federal Due Process rights have been recognized and sustained by Circuit Courts of Appeal and by the United States Supreme Court in both civil and criminal cases.

The authority upon which Defendants rely is entirely distinguishable both factually and legally, and cannot form a basis for dismissal of a viable cause of action established by the United States Code which has been recognized by the United States Supreme Court.

Mr. Bianchi's State Court action to attempt to remedy a disqualified Judge having participated in and authoring the Decision in his case was resolved by the California Supreme Court on or about May 12, 1999, well within the limitation provisions of 48 U.S.C. 1983.

II. ARGUMENT

A.

THE NATURE OF THE DEFENDANTS' ERRONEOUS CHARACTERIZATION OF PLAINTIFF'S COMPLAINT.

Plaintiff was a litigant in state court proceedings, including an appeal to the Fourth Appellate District of the Court of Appeal of the State of California, arising from a verdict rendered by a jury in a lengthy civil case tried in the Superior Court of the State of California for the County of Orange.

After the State Court jury reached its verdicts but prior to ruling on post-trial motions, the Judge who presided over the jury trial recused himself and another Judge, the Honorable William F. Rylaarsdam, a Defendant herein, was randomly assigned to that case in the place and stead of the recusing trial Judge. Thereafter, the Honorable William F. Rylaarsdam was removed for bias pursuant to the procedures established by California Code of Civil Procedure, section 170.6.[1] Upon

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[1] C.C.C.P. 170.6 provides, in part:
§170.6. Prejudice against party, attorney or interest thereof; motion and affidavit; assignment of another judge, court commissioner or referee; number of motions; continuance; cumulative remedy; severability.

his removal for bias, a third Judge was randomly assigned to the case. The post-trial motions were resolved and the matter proceeded to appeal in the Fourth Appellate District of the Court of Appeal of the State of California.

The Honorable William F. Rylaarsdam was elevated from the Superior Court bench to the State Court of Appeal and was assigned as a Judge of the Fourth Appellate District of that Court. In the interim, the opposing party appealed from a determination of the trial Judge dismissing a cause of action as a matter of law and a finding that the opposing party had acted in bad-faith in bringing a claim for relief against Mr. Bianchi, and Mr. Bianchi cross-appealed from the jury verdict.

Shortly before oral argument at the Court of Appeal, notice was received that the matter had been assigned to a particular Panel of the Court. One of the Judges of the panel assigned to hear the case was the Honorable William F. Rylaarsdam who, while a Judge of the Superior Court, had been disqualified from hearing the case because of bias. Mr. Bianchi was personally ignorant of that fact (and his appellate counsel was not trial counsel and, likewise, did not apprehend that fact); neither did the Honorable William F. Rylaarsdam,

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(1) No judge, court commissioner, or referee of any superior, municipal or justice court of the State of California shall try any civil or criminal action or special proceeding of any kind or character nor hear any matter therein which involves a contested issue of law or fact when it shall be established as hereinafter provided that the judge or court commissioner is prejudiced against any party or attorney or the interest of any party or attorney appearing in the action or proceeding.

nor opposing counsel, disclose his prior disqualification (or his status as an advisor to a Committee of the State Bar whose members included, in and among others, an attorney of the opposing party's lawfirm).

After the appellate decision was received, the decision was scrutinized against the record and the identity of Judge Rylaarsdam as a Judge previously disqualified for bias in the underlying Superior Court action was discovered by appellate counsel. Upon discovering that Judge Rylaarsdam had been for bias below, Mr. Bianchi moved the Fourth Appellate District for an Order recalling the Remittitur and for reassignment of case for argument before a different and neutral Panel of the Fourth Appellate District or before a different District of the court. However, the presiding Judge of the Panel in question, Defendant, Sills, summarily denied that request. Mr. Bianchi's then attempted to obtain a writ of mandate from the California Supreme Court but his Petition was denied, without comment, by the State's High Court on May 26, 1999.

On October 6, 1999, having thus exhausted his State Court remedies, Mr. Bianchi sought relief from the United States District Court pursuant to the provisions of 42 U.S.C. 1983, et seq., for prospective injunctive relief to remedy the deprivation of his Federal Due Process rights, to wit: his right to have his case decided by a neutral and detached adjudicator.

B.

THE COMPLAINT CHALLENGES NEITHER THE SUBSTANTIVE STATE COURT DECISION, NOR THE STATE COURT PROCEDURES; THE COMPLAINT ADDRESSES A DEPRIVATION OF FEDERAL DUE PROCESS RIGHTS BY STATE JUDICIAL OFFICERS.

The law is clear that a litigant is entitled to a neutral and detached adjudicator as a matter of Due Process. *Ward vs. Village of Village of Monroeville,* 409 U.S. 57, 34 L.Ed.2d 267, 93 S.Ct. 80 (1972); *Concrete Pipe and Products of California, Inc. vs. Construction Laborers" Pension Trust for Southern California,* 508 U.S. 601, 124 L.Ed.2d 539, 113 S.Ct. 2264 (1993).

In *Ward vs. Village of Monroeville,* supra, the Mayor of Monroeville, Ohio, in a contested case, convicted an accused of two traffic offenses and fined him $50.00 for each offense, acting pursuant to Ohio statutory provisions authorizing Mayors to sit as Judges in cases of ordinance violations and certain traffic offenses. The conviction was sustained by the Ohio Court of Appeals and by the Ohio Supreme Court. On certiorari, the United States Supreme Court reversed. In an Opinion authored by Justice Brennan, expressing the views of seven members of the Court, the Court held, in and among other things, that since an accused is entitled to a neutral and detached Judge in the first instance, the trial by the Mayor, who had a conflicting interest in increasing municipal revenues, was not constitutionally acceptable merely because the case was subject to appeal and a trial de novo in a higher State Court.

Likewise, in *Concrete Pipe and Products of California, Inc. vs. Construction Laborers Pension Trust for Southern California,* supra, the Supreme Court held that Due Process requires a neutral and detached Judge in the first instance; that before one may be deprived of a protected interest, whether in a criminal or a civil setting, one is entitled, as a matter of Due Process of law, to an adjudicator who is not in a situation which would offer possible temptation to the average man as Judge which might lead him not to hold balance nice, clear and true, and that even appeal and trial de novo will not cure the failure to provide a neutral and detached adjudicator required as a matter of Due Process in the first instance.

Such is precisely the nature of Mr. Bianchi's Complaint. He was deprived of Due Process because the decision in his case on appeal was authored by a Judge who previously had been disqualified because of bias from the same case below.

The Defendants, however, do not correctly apprehend the nature of the Plaintiff's Complaint. Rather, they erroneously characterize the Plaintiff's Complaint either as an effort to attack a substantive decision of a State Court or as an effort to attack rules and procedures of a State Court. The Defendants argue that in either event, the District Court has no jurisdiction to entertain such attacks and that such attacks must be made, as a matter of original jurisdiction, in the United States Supreme Court. However, while the Plaintiff takes no issue with the general statement of law respecting the original jurisdiction of the United States Supreme Court, it is clear upon the face of the Complaint that the Defendants' argument is based upon a misperception and mischaracterization of the nature of Plaintiff's causes of action.

Plaintiff's Complaint does not attack the substantive determination of the Court of Appeal. Plaintiff argues, without reference to the substantive determination, that he was deprived of a neutral and detached adjudicator in the first instance. No subsequent appeal process, whether by way of rehearing to the Court of Appeal or by further discretionary appeal to the California Supreme Court, is sufficient to overcome the deprivation of the Plaintiff's Due Process right to have a neutral and detached Judge in the first instance. See, *Concrete Pipe and Products of California, Inc. vs. Construction Laborers' Pension Trust for Southern California,* supra.

Nor does the Complaint attack the rules or procedures of the California Courts. California Code of Civil Procedure 170.6 allowed for the disqualification of a trial Judge for bias and that procedure was undertaken. As a result of the undertaking of the procedure, the Honorable Judge Rylaarsdam was disqualified from hearing the case at the Superior Court. There is no issue with respect to this fact, nor is the manner of appeal, nor Bianchi's petition for extraordinary relief, challenged by way of Plaintiff's Complaint. Both parties to the action in the Superior Court brought appeals to the California Court of Appeal. The appeal, in the first instance, was brought by the opposing party, which sought to overturn a judicial determination that, as a matter of law, it proceeded against the Plaintiff on a crossclaim in bad-faith. The Plaintiff herein, Mr. Bianchi, appealed from the jury verdict rendered in the State Court proceedings. No issue is raised regarding the procedure for appeal or the rules governing the appeal or the disqualification of Judges.

Rather Mr Bianchi complains that he has been deprived of a Federally protected Due Process right because a Judge

participating in the resolution of the State Court appeal and who authored the decision resolving that appeal was not a neutral and detached adjudicator but was a Judge who previously had been disqualified from the same case for bias. Mr. Bianchi argues that in depriving him of the right to have the appeal heard by a neutral and detached adjudicator in the first instance, the Defendants have deprived him of a Federally protected Due Process interest, a Due Process interest which has been recognized by the United States Supreme Court. See, *Ward vs. Village of Monroeville,* supra; Concrete *Pipe and Products of California, Inc. vs. Construction Laborers Pension Trust of Southern California,* supra.

Therefore, the *Roker-Feldman Doctrine,* upon which Defendants rely, is simply inapplicable. Mr. Bianchi neither challenges the substantive decision of the Court, nor the rules, nor the procedures, of the Court by which the decision was rendered. Mr. Bianchi, however, does challenge the deprivation of Federally protected Due Process rights by State judicial officers acting in their official capacities.

The Defendants' reliance upon *Allah vs. Superior Court of State of California,* 871F.2d 887 (9th Cir. 1989) is misplaced. In *Allah,* the Appellant sought review of the District Court's dismissal of his action against the Superior Court, a state Court, for lack of subject matter jurisdiction. The existence of subject matter jurisdiction in the District Court presented a question of law which was reviewed *de novo* by the Ninth Circuit Court of Appeals. That Circuit Court held that United States District Courts have subject matter jurisdiction over general challenges to rules promulgated by State Courts in non-judicial proceedings which do not require a review of a final State Court judgment in a particular case. *Allah vs. Superior Court,* supra, at 890.

The Ninth Circuit held that, as Courts of original jurisdiction, the District Courts do not have jurisdiction over direct challenges to final decisions of State Courts even if those challenges allege that the State Court action was unconstitutional. In the case presented to the Ninth Circuit, Allah filed a personal injury action in the Los Angeles County Superior Court. That action was dismissed by the State Court because of his failure to comply with a discovery Order. In its Petition to the District Court, Allah argued that the State Court violated his federally protected equal protection and due process right by dismissing his case on procedural technicality instead of making a final determination on the merits. The Court held that, to the extent that Allah requested the District Court to conduct a direct review of the State Court's Judgment and to scrutinize the State Court's application of various rules and procedures pertaining to his case, the District Court lacks subject matter jurisdiction over his Complaint and that the proper Court in which to obtain a direct review of the State Court determination was the United States Supreme Court. Ibid, at 891.

Mr. Bianchi's case is clearly distinguishable upon the facts. Here, Bianchi does not challenge the substantive State Court determination, nor does he argue with the State Court determination on its merits. Bianchi's argument is that he was denied Federally protected Due Process rights, in the first instance, because his controversy was not decided by an impartial and detached adjudicator. The State procedures involved in the appeal are not at issue nor are the substantive merits of the underlying appeal.

Therefore, Bianchi's action is not, as alleged, "an impermissible collateral attack on a prior state court decision." Rather, Bianchi's section 1983 claim is that he was denied Federally protected Due Process because his case was

not decided by a neutral and detached Judge in the first instance, claims which have been specifically recognized and allowed by the United States Supreme Court. See, *Ward vs. Village of Monroeville,* supra; *Concrete Pipe and Products of California, Inc. vs.* Construction Laborers' Pension Trust of Southern California, supra.

Because Mr. Bianchi was denied his Due Process in having his case decided by a panel which included, and a decision which was authored by, a Judge who previously had been removed for bias, the deprivation of Federally protected Due Process is ripe for consideration. Indeed, merely because two of the three Judges on the panel were not involved in the prior case does not detract from the fact that the author of the opinion was the Judge removed for bias, and the effect that that Judge had upon the deliberation process and the opinions of the two other Judges of the panel should not be left for speculation. The fact that the previously removed Judge took part in the deliberative process and authored the decision constituted a deprivation of a Federally protected Due Process right which guaranteed Mr. Bianchi a neutral and detached Judge, in the first instance, to adjudicate his claim.

Moreover, Mr. Bianchi does not argue here that it was error for the Court of Appeal to deny his claim or that it was error for the Supreme Court of California to deny his application for Writ of Mandate, nor does Mr. Bianchi here seek a rehearing of the appeal on the merits based upon the nature of the decision rendered. Mr. Bianchi has not addressed the substance of the underlying State Court decision, the issues decided by the Court in that decision or whether the issues were or were not properly decided. Mr. Bianchi's deprivation of Due Process occurred, in the first instance, by a Judge previously disqualified for bias adjudicating his case. The United States Supreme Court in

Ward and in *Concrete Pipe and Products of California,* made it very clear that the issue of deprivation of Due Process by a Judge was neither neutral, nor detached, in deciding a case in the first instance constitutes, in and of itself, a deprivation of a Federally protected Due Process right.

Contrary to Defendants' claim, Mr. Bianchi does not seek a declaratory judgment that seeks a review of a denial of a Petition for Writ of Mandate. The fact that a Writ of Mandate was applied for was pleaded to show that Mr. Bianchi attempted exhaust his State Court remedies, Cf: *Voigt vs. Savell,* 70 F.3d 1552 (9th Cir. 1995), *cert. denied,* 517 U.S. 1209 (1996), and proceeded here in a timely fashion. The reason for the denial the Writ of Mandate was not expressed by the California Supreme Court, nor was it challenged by Mr. Bianchi in the instant Complaint. Again, Mr. Bianchi challenges the fact that he was deprived, in the first instance, of a neutral and detached adjudicator, a fact that the United States Supreme Court recognized cannot be cured by further appellate or *de novo* procedures. *Concrete Pipe and Products of California, Inc. vs. Construction Laborers' Pension Trust of Southern California,* 508 U.S. at 617:

> "Before one may be deprived of a protected interest, whether in a criminal or civil setting, [citations omitted], one is entitled as a matter of due process of law to an adjudicator who 'is neutral and detached' and that '[e]ven appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator.'"

Concrete Pipe and Products of California, Inc. vs. Construction Laborers Pension Trust of Southern California, 508 U.S. at 617-18, citing *Clarence vs. Ward,* 409 U.S. 57 at 61.

The Supreme Court's pronouncement was unequivocal:

> "'[J]ustice' indeed 'must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'"

Concrete Pipe and Products of California, Inc. vs. Construction Laborers' Pension Trust of Southern California, 508 U.S. at 618, citing *Marshall vs. Jerrico, Inc.,* 466 U.S. 238, 243.

C.

THE UNITED STATES SUPREME COURT HAS RECOGNIZED THE TYPE OF CAUSE OF ACTION BROUGHT BY MR. BIANCHI IN THE INSTANT CASE.

The United States Supreme Court in *Pulliam vs. Allen,* 466 U.S. 522 (1984), recognized limits to the Doctrine of Judicial Immunity and held, unequivocally, that the Doctrine of Judicial Immunity does not bar suits against Judges which seek prospective injunctive or declaratory relief and, if such relief is granted, an award of attorney's fees pursuant to the Civil Rights Attorney's Fees Award Act of 1976, codified as 42 U.S.C. 1988, is appropriate.

In *Pulliam,* respondents were arrested for non-jailable misdemeanors. The petitioner, a magistrate in a Virginia County, imposed bail and, when the respondents were unable to meet the bail, petitioner committed them to jail. The respondents subsequently brought an action against the petitioner in Federal District Court under 42 U.S.C. 1983,

claiming that the petitioner's practice of imposing bail on persons arrested for non-jailable offenses under Virginia law and of incarcerating those persons if they could not meet bail was unconstitutional. The District Court agreed and enjoined the practice and also awarded respondents costs and attorney's fees under the Civil Rights Attorney's Fees Award Act of 1976. Determining that judicial immunity did not extend to injunctive relief under 42 U.S.S.C. 1983, and that prospective injunctive relief had been properly awarded against petitioner, the Court of Appeals for the Fourth Circuit affirmed the award of attorney's fees. On certiorari from the Court of Appeals for the Fourth Circuit, the United States Supreme Court upheld the right to impose prospective injunctive relief against judicial officers acting in their official capacities and further upheld the right to an award of attorney's fees if such prospective injunctive relief had been granted against the State Judge.

The type of relief afforded the aggrieved party by the United States District Court, as affirmed, first, by the United States Court of Appeals for the Fourth Circuit and, ultimately by the United States Supreme Court in *Pulliam vs. Allen,* supra, is precisely the type of relief which Mr. Bianchi seeks in the United States District Court here. Mr. Bianchi seeks a prospective injunction against State judicial officers to require that his case be heard, in the first instance, before adjudicators who are neutral and detached. If Mr. Bianchi is afforded this prospective injunctive relief, then he is also entitled to an award of attorney's fees pursuant to 42 U.S.C. 1988.

If the Defendants' logic in support of their Motion to Dismiss is accepted, then the statutory scheme established by Congress and codified at 42 U.S.C. 1983, et seq., is without purpose and is a nullity. If the logic of the Defendants in this

case is accepted, the United States Supreme Court would not have affirmed the right of a litigant to seek prospective injunctive relief against a State judicial officer, upon the grounds that action by the aggrieved litigant could be construed as an attack on the substantive decisions of the State judicial officer or a substantive attack on the rules and proceedings of a State Court.

Mr. Bianchi's claim transcends those narrow concerns. His claim is that the Defendants deprived him of a Federally protected Due Process right, in the first instance, because the Panel which undertook the appeal was not neutral and detached and, thus, violated a Federally protected Due Process right recognized by the United States Supreme Court.

D.

THE ELEVENTH AMENDMENT DOES NOT BAR PLAINTIFF'S CLAIM.

Defendants have asserted that the Plaintiff's section 1983 claim is barred by the application of the Eleventh Amendment, which reserves to the States any rights not specifically conferred to the Federal Government. In a broad stroke, the Defendants argue that a "claim that State officials violated State law in carrying out their official responsibilities...is barred by the Eleventh Amendment regardless of the relief sought, " relying on *Pennhurst State School & Hospital vs. Halderman,* 465 U.S. 89 (1984). However, Mr. Bianchi does not claim that the State officials violated State law in carrying out their official responsibilities. Rather, he claims that the State officials violated a Federally protected interest by not allowing his case to be adjudicated by a neutral and detached adjudicator. In *Ex Parte Young,* 209 U.S. 123 (1908), the United States

Supreme Court decided that suits against State officials in Federal Courts are not barred by the Eleventh Amendment. That statement of the law was affirmed by the United States Supreme Court in *Supreme Court of Virginia vs. Consumers Union,* 466 U.S. 719 (1980).

Moreover, the Defendants' reliance on *Pennhurst State School & Hospital vs. Halderman,* supra, is misplaced. In *Pennhurst,* the respondent, a resident of petitioner, Pennhurst State School & Hospital, a Pennsylvania institution for care of the mentally retarded, brought a class action in United States District Court against Pennhurst, certain of its officials, the Pennsylvania Department of Public Welfare and various State and County officials alleging that the conditions at Pennhurst violated various Federal and constitutional and statutory rights of the class members, as well as their rights under the Pennsylvania Mental Health and Mental Retardation Act of 1966 (M.H./M.R. Act). Ultimately, the District Court awarded injunctive relief based upon the M.H./M.R. Act, which was held to provide a right to adequate habilitation. The Court of Appeals affirmed, holdingthat the M.H./M.R. Act required the State to adopt the "least restrictive environment" for the care of the mentally retarded and rejected petitioner's argument that the Eleventh Amendment barred a Federal Court from considering this pendant State law claim. The Circuit Court reasoned that since the Amendment did not bar a Federal Court from granting prospective injunctive relief against State officials on the basis of Federal claims, citing *Ex Parte Young,* supra, the same result obtained with respect to a pendant State law claim. On appeal, however, the United States Supreme Court held that the Eleventh Amendment prohibited the District Court from ordering State officials to conform their conduct to State law.

Here, Mr. Bianchi is doing no such thing. He is not

attempting to obtain an order compelling State officials to comply with State law. Rather, he seeks a prospective injunction upon the ground that his Federally protected Due Process right to a neutral and detached adjudicator was deprived him by State judicial officials acting in their official capacities.

Likewise, *Voigt vs. Savell,* 70 F.3d 1552 (9th Cir. 1995), *cert. denied,* 517 U.S. 1209 (1996), is distinguishable. In that case, Voigt appealed from the dismissal of his action against Richard D. Savell, the presiding Judge of the Fourth Judicial District of the Alaska Court system, and several senior members of the Alaska Court system's administrative staff. In his claim, Voigt contended that the District Court erred in granting summary judgment in favor of the Defendants on his 42 U.S.C. 1983 claim for unlawful discharge in violation of his First Amendment right to free speech and his Fourteenth Amendment right to procedural Due Process. He further contended that the District Court erred in granting summary judgment in favor of the Defendants on his claim under 42 U.S.C. 1985, in which he alleged that the Defendants conspired to discriminate against non-residents of Alaska when hiring Court personnel.

The Ninth Circuit affirmed the District Court's judgment for two reasons. First, with regard to the First Amendment claim, the application of a balancing test articulated in *Pickering vs. Board of Education,* 391 U.S. 563 (1968), led the Court to the conclusion that Voigt's speech was not entitled to constitutional protection in the context of his wrongful discharge action. Here, no First Amendment issues are involved.

Second, the Court declined to reach the merits of the Fourteenth Amendment claim because, in the District Court,

Voigt expressly abandoned his claim that the Defendants violated his Federal Due Process right. The Court reasoned that because the claim had been formally abandoned, Voigt lacked standing to raise that claim on appeal.

Were the Defendants' logic with respect to the purview of the Eleventh Amendment to be accepted, the United States Supreme Court's decision in *Pulliam vs. Allen,* supra, would be a nullity. Upon the Defendants' reasoning, any claim brought in Federal Court challenging a State judicial officer should be dismissed because, in Defendants' reasoning, a fortiori, State law and/or procedures must be involved.

Here, Mr. Bianchi does not seek Federal intervention to compel a State judicial officer to conform to a State statute. Rather, Mr. Bianchi claims that the State judicial officer deprived him of a Federally guaranteed right to have his controversy heard by a neutral and detached adjudicator and that the Defendants, acting by and through a Judge once disqualified in the same case, deprived him of that Federal Due Process right. The issue presented to this Court is whether there has been a deprivation of a Federal Due Process right by the actions of State judicial officers.

E.

THE PLAINTIFF'S SECTION 1983 CLAIM IS TIMELY

Defendants urge dismissal of Plaintiff's Section 1983 claim alleging that it is barred by the applicable statute of limitation. While the statute of limitations for claims brought under 42 U.S.C. 1983 is one year, see, e.g., *McDougal vs. County of Imperial,* 942 F.2d 668, 673-74 (9th Cir. 1991), the Court in *McDougal* made it clear that the pendency of State

Court litigation tolls that limitation period.

> "In this case, the McDougal's claim arose prior to the *Wilson* decision, but the limitations period was tolled during the pendency of state court litigation."

McDougal vs. County of Imperial, 942 F.3d at 674.

As appears by Defendants' Statement of Facts, after Mr. Bianchi's Motion to the Court of Appeal to Recall the Remittitur because of Judge Rylaarsdam's participation was denied, he next brought a Petition for Writ of Mandate before the California Supreme Court, seeking a Writ to require the Court of Appeal to recall the remittitur and to assign the case to a different division or different Appellate District of the appellate Court. The California Supreme Court denied that Petition for Writ of Mandate, without comment, on May 26, 1999. See, Defendants' Motion to Dismiss, p. 6, Ll. 8-16; see, also, Plaintiff's Complaint, ¶ 27, p. 9.

Clearly, then, the State Court action was final on or about May 26, 1999. The instant Complaint was filed on October 6, 1999, less than five months after the California Supreme Court denied the Plaintiff's Petition for Writ of Mandate.

Thus, the Defendants' speculation as to when Mr. Bianchi learned of the prior disqualification of Judge Rylaarsdam is of no moment, as proceedings were pending, either before the Court of Appeal, itself, or before the California Supreme Court, through and including the latter's denial of the Petition for Writ of Mandate in May 1999.

Moreover, the allegation that the statue of limitation had been violated raises facts outside of the scope of the pleadings. When evidence is presented upon a motion to

dismiss outside of the scope of the complaint and the Court accepts such evidence, the Court shall treat the motion to dismiss as one for summary judgment under F.R.Civ.P. 56. See, *Davis vs. City of Denver,* 101 F.3d 1344, 1352 (10th Cir. 1996); *Anderson vs. Angelone,* 86 F.3d 932, 934 (9th Cir. 1996).

It is elementary and axiomatic that, in construing a motion for summary judgment, the Court will assess the threshold issue of whether a genuine issue exists as to material facts requiring trial. *Anderson vs. Liberty Lobby, Inc.* 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Thus, the evidence of the non-moving party will be believed as true, all doubts will be resolved as against the moving party, all evidence will be construed in a light most favorable to the non-moving party and all reasonable inferences will be drawn in the non-moving party's favor. *Eastman Kodak Co. vs. Image Tehnical Servs., Inc.,* 504 U.S. 451, 456, 112 S.Ct. 2072, 2076, 119 L.Ed. 265 (1992). The party moving for summary judgment, like the proponent of any motion, has the burden of proof. Here, at best, all the Defendants have done is raise an issue of fact as to whether or not the statute of limitation has been violated. Such an issue of fact, itself, would warrant a denial of the motion for summary judgment.

III.

CONCLUSION

Rather than addressing the issue presented by Mr. Bianchi's Complaint as one of deprivation of Federal Due Process rights, the Defendants have erroneously characterized the Complaint as one seeking appellate review of the substantive decisions of the State court. Such characterization is unwarranted and unjustified upon the face of the

Complaint. Mr. Bianchi does not seek Federal appellate review of a State Court decision. Rather, Mr. Bianchi independently asks the Federal Court to provide prospective injunctive relief to protect his Federal Due Process right to have his controversy heard by an impartial tribunal.

The common law has long recognized the use of prerogative or peremptory writs, including habeas corpus, certiorari, prohibition, mandamus, quo warranto and re nexeat regno issued by one Court to require another Court to exercise its jurisdiction which it has declined to exercise or to refrain from exercising jurisdiction which it has no right to exercise. *Pulliam vs. Allen,* supra, at 466 U.S. 522, 533-534. Various Circuit Courts of Appeal have recognized and expanded upon this common law doctrine and, in numerous cases, have provided prospective injunctive relief against State judicial officers to prevent an unconstitutional exercise of jurisdiction or the deprivation of a State Court litigant's Federal Due Process and Equal Protection rights. These actions of the various Circuit Courts of Appeal have been recognized and affirmed by the United States Supreme Court in a line of authority which extends, and is recognized as viable, to this day.

The Defendants' erroneous characterization of Mr. Bianchi's claims notwithstanding, Mr. Bianchi does not seek appellate review of a substantive State Court decision, nor of the State Court rules or procedures. Rather, Mr. Bianchi seeks to address a deprivation of his Federally protected Due Process right to have his case adjudicated, in the first instance, by neutral and detached adjudicators.

The Federal statute of limitations argument is without merit. Mr. Bianchi's claim was stayed by the pending State Court actions and was brought within five months of the final

decision of the California Supreme Court, to wit: the denial by that Court of Mr. Bianchi's Petition for Writ of Mandate.

Accordingly, Defendants' Motion to Dismiss should be denied.

DATED this 8th day of January, 2000

Respectfully submitted,

GRAZIADEI & CANTOR, LTD.
/s/_____

SCOTT MICHAEL CANTOR, ESQ.
California Bar No. 79851
302 East Carson, Suite 400
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Telephone: (702) 477-7733
Attorneys for Plaintiff
MAURICE BIANCHI

PROOF OF SERVICE

Case Name: **Maurice L. Bianchi v. William F. Rylaarsdam**, et al. Case Number: **SA CV-99-1236 AHS (EEX)**

I declare that:

I am over the age of eighteen years and not a party to the above-entitled case. My business address is 302 East Carson Avenue, Suite 400, in the County of Clark, City of Las Vegas, Nevada, 89101.

I am readily familiar with the practice at my place of business for the collection and processing of correspondence for mailing with the United States Postal Service and that correspondence is deposited with the United States Postal Service on the same day, with postage fully prepaid, in the ordinary course of business.

On February 10th 2000, I served the attached

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

by placing a true copy thereof in a sealed envelope for collection and mailing with the United States Postal Service in the ordinary course of the above-addressed business addressed, as follows:

KYUNGAH SUK, ESQ.
Deputy Attorney General
300 South Spring Street
Los Angeles, California 90013

ANNEMAIRE C. O'SHEA, ESQ.
Judicial Counsel of California
455 Golden Gate Avenue
San Francisco, California 94102-3660

KENNETH R. CHIATE, ESQ.
PATRICK G. ROGAN, ESQ,
725 South Figueroa Street, Suite 1200
Los Angeles, California 90017-5443

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct, and that the declaration was executed at Las Vegas, Nevada on February __, 2000.

SELENA DYE _____ /s/ _____
(Typed Name) (Signature)

PROOF OF SERVICE

Case Name **Maurice L. Bianchi v. William F. Rylaarsdam**, et al.
Case Number **SA CV.99-1236 AHS (EEX)**

I declare that

I am over the age of eighteen years and not a party to the above-entitled case. My business address is 300 South Spring Street, Suite 5212, in the County and City of Los Angeles, California 90013-1233.

I am readily familiar with the practice at my place of business for the collection and processing of correspondence for mailing with the United States Postal Service and that correspondence Is deposited with the United States Postal Service on the same day, with postage fully prepaid, In the ordinary course of business.

On January 25, 2000, I served the attached

NOTICE OF MOTION TO DISMISS COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF, PROPOSED ORDER; NOTICE OF INTERESTED PARTIES

by placing a true copy thereof in a sealed envelope for collection and mailing with the United States Postal Service in the ordinary course of the above addressed business, addressed as follows:

Scott Michael Cantor, Esq.
GRAZIADEI & CANTOR, LTD.
302 E Carson Avenue, Ste. 400
Las Vegas, Nevada 89101

Annemarie C O'Shea
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102-3660

I declare under penalty of perjury under the laws of the State of California that the foregoing true and correct, and that this declaration was executed at Los Angeles, California, on January 25, 2000

LAVON TENNISON /s/
(Typed Name) (Signature)

APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: SA-CV-99-1236 AHS (EEX)

[Filed February 22, 2000]

MAURICE L. BIANCHI f/d/b/a M. BIANCHI OF CALIFORNIA, Plaintiffs,	)
v.	)
WILLIAM F. RYLAARSDAM, DAVID G. SILLS AND EDWARD J. WALLIN, et al. Defendants.	)
BANK OF AMERICA TRUST & SAVINGS ASSOCIATION, Real Party-In-Interest	)

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

Date: February 28, 2000
Time: 10:00 a.m.
Dept: 10-A
Judge: Alicemarie H. Stotler

INTRODUCTION

In Plaintiff Bianchi's Opposition, Plaintiff claims that the Defendants' have erroneously characterized his Complaint. Plaintiff alleges that the Complaint does not challenge the underlying state court decision or proceeding but addresses a separate federal due process violation by state judicial officers.

Defendants Judges William F. Rylaarsdam, David G. Sills, and Edward J. Wallin brought a motion to dismiss for lack of federal jurisdiction based on the Rooker-Feldman Doctrine because Plaintiff's Complaint is inextricably intertwined with his state court proceedings. Despite Plaintiff's protestations, Plaintiff cannot circumvent the Rooker-Feldman Doctrine. Even if, arguendo, Plaintiff's claim constitutes a general constitutional challenge, state judicial officers are immune from section 1983 suits for injunctive relief and plaintiff fails to state a "case or controversy" for declaratory relief.

ARGUMENT

THE ROOKER-FELDMANDOCTRINE APPLIES TO THE INSTANT CASE.

Plaintiff claims that the Rooker-Feldman Doctrine is inapplicable to his case because he is not challenging the substantive decision of the state courts. (Opposition at p. 10). Plaintiff alleges that he is merely challenging the deprivation of federally protected due process rights by state judicial officers. (Id.).

Plaintiff's request for relief, however, belies Plaintiff's claim of a general constitutional challenge. Plaintiff does not seek redress, for his purported constitutional injury; instead Plaintiff seeks a reversal of the state court decision which the district court is without jurisdiction to grant. (See Branson v. Nott, 62 F.3d 287,291-292 (9th Cir. 1995)).

The plaintiff in Branson brought a section 1983 action in federal district court, alleging that certain attorneys, superior court clerk, state trial judge, and appellate justices deprived him of his right to procedural due process. Despite Branson's allegations that he was making a general constitutional challenge that would provide federal jurisdiction, Branson sought prospective injunctive relief that would implicitly reverse the state court decision. (Id. at 292). The Ninth Circuit Court of Appeals found that the district court was without jurisdiction grant such relief. (Id.).

The Branson case is on point here. The Plaintiff seeks an injunction mandating Defendants to recall the Remittitur of Plaintiff's appeal in State of California, Fourth Appellate District, Case No. G014893, vacating the Decision authored by Defendant, Rylaarsdam, and transferring the case for re-argument and decision before a different Appellate Division or different Appellate District of the Court of Appeal of the State of California." (Compl. ¶ 27, p.9). Clearly, Plaintiff seeks a judgment that would reverse the state court decision denying such relief. This court could not adjudicate Plaintiff's claim and provide the requested relief without reviewing and reversing the decision of the state court. Thus, the Plaintiff's case is inextricably intertwined with the state court decision and falls under the Rooker-Feldman Doctrine.

II.

AN ACTION FOR INJUNCTIVE RELIEF AGAINST STATE JUDGES IS BARRED UNDER SECTION 1983.

Plaintiff claims that Pulliam v. Allen, 466 U.S. 522 (1984) recognizes the limits to the doctrine of judicial immunity. (Opposition at p.14) . However, on October 19, 1996, Congress enacted the Federal Courts Improvement Act of 1996 which legislatively reversed Pulliam, and amended Section 1983 to provide that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." (§ 309(c) Pub. L. No. 104-317, 110 Stat. 3847, 3853 (1996)).

Here, Plaintiff alleges neither the violation of a declaratory decree, nor the unavailability of declaratory relief. Thus, Plaintiff's claim for injunctive relief is barred undersection 1983.

III.

PLAINTIFF FAILS TO ALLEGE AN ARTICLE III CASE OR CONTROVERSY.

Even if arguendo, the present claim constitutes a general constitutional challenge, in light of the amendment to section 1983, the only remaining option for plaintiff would be to seek declaratory relief. Even here, Plaintiff's claim must fail because Plaintiff fails to state an Article III case or controversy. The federal Constitution requires that Courts only decide "cases" or "controversies". Moreover, whenever a plaintiff seeks declaratory and injunctive relief, there must

be a "substantial controversy ... of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." (Ross v. Alaska, 189 F.3d 1107, 1114 (9th Cir.1999) quoting Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273(1941)).

Plaintiff requests that this Court "declar[e] that the actions of an Appellate Court Judge, who was once disqualified from the same matter at the inferior Court, in sitting in judgment upon the appeal of the Decision from which he was disqualified, in his failure to disclose the fact of that prior disqualification and in his participation in the decision and in authoring the Opinion on the appeal from the case from which he was disqualified, are unconstitutional." (Compl. at p.10-11).

The question in this case is whether the requested declaration is "of sufficient immediacy and reality" such that it is ripe for review. Plaintiff fails to state any real or imminent threat of facing the same set of circumstances as alleged in his state court proceedings. The likelihood of appearing before the same disqualified state trial court judge at the court of appeal level is purely conjectural. Plaintiff seeks a general declaration and seeks relief that is no more directly and tangibly benefits him than it does the public at large. Such a general declaration does not state an Article III case or controversy. Thus, plaintiff fails to state a case or controversy for declaratory relief.

CONCLUSION

For the foregoing reasons state above, Defendants request that this court grant the Defendants' Motion to Dismiss without leave to amend.

Dated: February 22, 2000

Respectfully submitted,
BILL LOCKYER, Attorney General
of the State of California
MANUEL MEDEIROS,
Senior Assistant Attorney
General
CHRISTOPHER FOLEY,
Supervising Deputy Attorney
General

By /s/_____
KYUNGAH SUK, Deputy Attorney
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Telephone: (213) 897-9176
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Attorneys for Defendants
Honorable William F. Rylaarsdam,
Honorable David G. Sills, and
Honorable Edward J. Wallin

PROOF OF SERVICE

Case Name: **Maurice L. Bianchi v. William F. Rylaarsdam, et al.**
Case Number: **SA CV-99-1236 AHS (EEX)**

I declare that:

I am over the age of eighteen years and not a party to the above-entitled case. My business address is 300 South Spring Street, Suite 5212, in the County and City of Los Angeles, California 90013-1233.

I am readily familiar with the practice at my place of business for the collection and processing of correspondence for mailing with the United States Postal Service and that correspondence is deposited with the United States Postal Service on the same day, with postage fully prepaid, in the ordinary course of business.

On February 22, 2000, I served the attached

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

by placing a true copy thereof in a sealed envelope for collection and mailing with the United States Postal Service in the ordinary course of the above addressed business, addressed as follows:

Scott Michael Cantor, Esq.
GRAZIADEI & CANTOR, LTD.
302 E. Carson Avenue, Ste. 400
Las Vegas, Nevada 89101

Annemarie C. O'Shea
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102-3660

Kevin M. Fong
Attorneys at Law
P.O. Box 7880
San Francisco, CA 94120-7880

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at Los Angeles, California, on February 22, 2000.

LAVON TENNISON (Typed Name)

/s/ (Signature)

APPENDIX J

5078097

IN THE SUPREME COURT OF CALIFORNIA

[Filed May 26, 1999]

MAURICE L. BIANCHI, Petitioner,	)
v.	)
COURT OF APPEAL FOURTH APPELLATE DISTRICT DIV. 3 ET AL., Respondents.	)
BANK OF AMERICA N T & S A, Real Party in Interest	)

Petition for writ of mandate DENIED.
Baxter, J., and Chin, J., did not participate.

/s/
Chief Justice

APPENDIX K

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

Case No. G01483

[Filed May 7, 1998]

MAURICE L. BIANCHI, Respondent and Cross-Appellant,	)
v.	)
BANK OF AMERICA NATIONAL TRUST AND SAVINGS, Appellant and Cross-Respondent.	)

ORDER

Respondent and cross-appellant's motion to recall the remittitur and for further relief is DENIED. (*Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933.)

/s/
SILLS, P.J.

APPENDIX L

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE

Case No. G014893

[Filed April 10, 1998]

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association, Appellant/Cross-Respondent,	)
v.	)
MAURICE L. BIANCHI, Respondent/Cross-Appellant.	)

On Appeal from the Superior court of the State of California, Orange County

SCOTT MICHAEL CANTOR, ESQ.
California Bar # 79851
GRAZIADEI & CANTOR, LTD.
302 E. Carson Ave., Suite 400
Las Vegas, Nevada 89101
(702) 477-7733
Attorney for Respondent/
Cross-Appellant
MAURICE L. BIANCHI

MOTION TO RECALL REMITTITUR AND FOR FURTHER RELIEF

COMES NOW, the Respondent/Cross-Appellant, MAURICE L. BIANCHI, fdba M. BIANCHI OF CALIFORNIA, by and through his counsel, SCOTT MICHAEL CANTOR, ESQ., and moves this Court pursuant to Rule 25(d) of the Rules of Appeal, for recall of the Remittitur issued herein on or about September 29, 1997, for vacation of the Court's Opinion entered herein on or about May 23, 1997, and for resetting of this matter for argument and decision before the Court en banc or for transfer of this case to a different Appellate District for argument and decision.

This Motion is made and based upon the grounds that one of the members of the three Judge Panel deciding this case, the Justice who actually authored the Court's opinion, the Honorable William F. Rylaarsdam, previously had been disqualified from hearing any matters in this case while a Judge of the Superior Court of the State of California, in and for the County of Orange, and should not have participated in the decision of this case on appeal.

This Motion is further made and based upon the grounds that the Decision authored by the disqualified the Honorable William F. Rylaarsdam, in which the Honorable Justices Sills and Wallin joined, is based on references to facts which do not conform to the record, and that the Court failed to consider and resolve Respondent/Cross-Appellant's Motion for Judicial Notice, thus, giving the appearance of actual bias or prejudice in the decision of this matter and the authorship of, and joinder, in the Court's Opinion.

This Motion is further made and based upon the records and pleadings herein, the Affidavit in support hereof and such argument as may be entertained by the Court should the Court desire oral argument on this issue.

DATED this ____ day of April, 1998.

SCOTT MICHAEL CANTOR, ESQ.
California Bar #79851
302 E. Carson Ave., Suite 400
Las Vegas, Nevada 89101
(702) 477-7733
Attorney for Respondent/
Cross-Appellant

I.

POINTS AND AUTHORITIES

This appeal arose out of a lengthy civil jury trial held in the Superior Court of the State of California, in and for the County of Orange. The case was tried before a jury empaneled in the Court of the Honorable Mason L. Fenton. After approximately 90 days of testimony taken over a period

of seven months, the Honorable Judge Fenton instructed the jury, the jury deliberated and returned with a verdict in favor of the Bank and against Mr. Bianchi on Mr. Bianchi's Complaint and against Mr. Bianchi and in favor of the Bank on the Bank's Crossclaim. Mr. Bianchi's trial counsel filed a Motion for Judgment Notwithstanding the Verdict and a Motion for a New Trial. However, before the Court ruled upon those Motions, the Honorable Judge Fenton recused himself, after first denying a Motion brought by the Defendant, Bank of America, to force his disqualification.

The case was then assigned to the Honorable William F. Rylaarsdam, then a Judge of the Superior Court of the State of California, in and for the County of Orange.

On or about August 4, 1993, Plaintiff's counsel brought a "Motion for Peremptory Disqualification; Declaration re: Prejudice," seeking the disqualification of the Honorable William F. Rylaarsdam upon the ground that the Honorable Judge was biased in favor of the Defendant or against the interests of the Plaintiff. Accordingly, and pursuant to the procedures established by California Code of Civil Procedure (CCP) 170.6 (2), the Honorable Judge Rylaarsdam was disqualified from acting in the case and all post-trial matters, as referenced in the Superior Court's Order. (Exhibit "1"; Index p. 1, Vol. I).

The matter was then assigned to the Honorable Judge Donald E. Smallwood, who denied the Motions for New Trial and for Judgment Notwithstanding the Verdict (not being familiar with the 90 days of testimony and lengthy record, essentially deferring to this Court for resolution).

On or about February 10, 1997, the Appellant's counsel received notice that this matter was set for argument before a

three Justice Panel of this Court consisting of the Honorable Justices Sills, Wallin and Rylaarsdam. Appellate counsel was not trial counsel; the record is massive and Appellate counsel did not notice the previous disqualification of Judge Rylaarsdam, as that fact was not germane to any of the issues on appeal. Although Judge Rylaarsdam had been disqualified from sitting in this action as the Superior Court Judge, he failed to recuse himself or to bring the fact of his previous disqualification to the attention of the Court or the parties. The Appellant, himself, was ignorant of the identity of the Justice as being a Judge once disqualified below; he attended oral argument, did not recognize the Justice by name and, after the Opinion was entered in this case, reviewed his files and spoke with one of his trial attorneys[1] who recognized that Justice Rylaarsdam had been disqualified in the Superior Court. Accordingly, the Plaintiff advised Appellate counsel of his concern. See Affidavit of Maurice Bianchi, hereto. Appellate counsel for Mr. Bianchi then reviewed the voluminous records of this case and confirmed that, in fact, the Honorable William F. Rylaarsdam was a Judge of the Superior Court who had been disqualified from sitting in this action pursuant to a Motion brought on or about August 4, 1993.

Because the Honorable Justice Rylaarsdam had been disqualified from participating in this case at the Superior Court, he lost jurisdiction to participate in this case and was prohibited from having any further involvement in the case; therefore, he should not have sat as a reviewing and authoring Justice. See, CCP 170.6.

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[1] Trial counsel were not involved in or of record in the matter of this appeal; appellate counsel was not involved in or of record in the matter below.

Unfortunately, the Honorable Judge Rylaarsdam either did not recall his previous disqualification or failed to bring the fact of his prior disqualification to the attention of the parties and the Court. Mr. Bianchi, who had not been privy to his counsel's disqualification of the Judge in Superior Court, was unaware of the Honorable Judge Rylaarsdam's disqualification or his identity as a previously disqualified Judge until after receipt of this Court's Opinion resolving the Appeal. See, Affidavit of Maurice Bianchi, hereto.

Aside from the obvious appearance of impropriety, the fact that the Honorable Judge Rylaarsdam had been previously disqualified becomes a material issue in this case because the Opinion which the Honorable Justice authored and in which the Honorable Justices Sills and Wallin joined, is replete with errors in its references to the record on appeal. The Court's Opinion essentially and, at times almost verbatim, tracks the brief of Appellant, Bank of America, as to factual allegations, even when those allegations do not appear upon the record or are affirmatively contradicted by the record on appeal. Therefore, it appears that there has been actual bias in the rendering of the Opinion in this case in favor of Bank of America and against Maurice L. Bianchi.

The areas in which the Opinion of the Court tracked the brief of Bank of America, while ignoring or stating facts directly contrary to that found upon the Court's record, are, without limitation, as follows:

(a) The Opinion falsely Calls the Cross-Appellant, Maurice L. Bianchi, inexperienced in the garment industry as a reason for his business failure; it erroneously refers to alleged testimony upon the record in support of an erroneous contention that Bianchi never contended that the Bank was responsible for his business problems or losses; the Opinion

incorrectly states that there was no evidence that the Bank's counsel, as opposed to Bianchi's counsel, contributed to excessive delay, although the record is replete with the Trial Judge's admonitions to the Bank's counsel because of repeated, systematic and deliberate delaying and obstructing tactics; the Opinion erroneously found for the validity of a Release which, on its face, did not release the Bank from a major portion of Bianchi's claim, which, as appears upon the record, had been unsupported by consideration in any event and which, the Court found, Mr. Bianchi was "comfortable" with by his own admission;

(b) In fact, the records show that Mr. Bianchi had extensive experience (25 years) in the garment manufacturing industry (RT 3863:15-3867:19), (Exhibit "2"; Index pp. 3-7, Vol. I); that the persons whom the Bank relied upon to show that Bianchi never contended that he had problems with the Bank were not people to whom Bianchi had complained or would have complained about his problems (RT 13369:6,8, (Exhibit "3"; Index p. 10, Vol. I); 13383:15-13384:6, (Exhibit "4"; Index pp. 13-14); 13392:13-13393:6, (Exhibit "5"; Index pp. 17-18, Vol. I); 13431:14-25, (Exhibit "6"; Index p. 21, Vol. I); 13431:3-4), (Exhibit "7"; Index p. 24, Vol. I); that the record shows, in exquisite detail, the lengths to which the Bank's counsel intentionally, repeatedly and by design delayed and obstructed the Court's proceedings in an effort to build reversible error into the record and the extent to which the Court repeatedly admonished the Bank's counsel because of reprehensible trial tactics[2] (RT 15508:5-11,

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[2] At page 10 of its Opinion, this Court found that Bianchi "fails to cite to any record references to support" his assertion of misconduct by the Bank's counsel or the delay that that misconduct occasioned, clearly tracking the Bank's argument and brief in this regard. See Bank's Brief in Opposition to Mr. Bianchi's appeal, P. 45.

(Exhibit "8"; Index p. 26, Vol. I); 15585:7-15592:8, (Exhibit "9"; Index pp. 28-35, Vol. I); 12409:222, (Exhibit "10"; Index p. 38, Vol. I); 12459:19-25, (Exhibit "11"; Index p. 41, Vol. I); 12464:7-21, (Exhibit "12"; Index p. 44, Vol. I); 12468:1-6, (Exhibit "13"; Index p. 47, Vol. I); 12476:19-26), (Exhibit "14"; Index p. 50, Vol. I); that the document allegedly releasing the Bank from liability did not, on its face, release the Bank from all of Bianchi's claim (it was limited in scope and by date of execution) and, in any event, was unsupported by consideration, (RT 2893:4-9, (Exhibit "15"; Index p. 52, Vol. I); 17966:1-8, (Exhibit "16"; Index p. 55, Vol. I); 7346:6-7347:3, (Exhibit "17"; Index pp. 58-59, Vol.

However, in Plaintiff's Opening Brief, he cited specific references to Bank's counsel repeatedly questioning the Court's rulings, at pages 80 to 83 of his Brief; the Bank's counsel's ex parte communication with the jury, cited at page 83 through 85 of hisBrief; Bank's counsel disobeying Court orders in the presence of the jury (on two days, March 4, 1993, and March 9, 1993) cited at pages 85 through 88 of his Brief; delay occasioned by the Bank disobeying Court orders to produce documents, cited at page 88 of the Brief; the Bank's counsel examining witnesses on documents that had been withheld from the Plaintiff, cited at pages 88 through 90 of the Brief; showing witnesses documents not admitted into evidence (on two specific days), cited at pages 90 through 93 of his Brief; Bank substituting documents, without leave, for those already in evidence, cited at page 93 of his Brief; and the effect of the totality of the misconduct, in the words of the trial Judge, himself, cited at pages 93 through 95 of his Brief; in Mr. Bianchi's Reply Brief, he made 27 specific citations to the record as to misconduct or instances of Bank's counsel disobeying the Court, between pages 38 and 50 of the Reply Brief; 14 specific citations to misconduct at pages 50 through 54 of the Reply Brief; 6 citations to intentional withholding and suppression of discoverable evidence, cited at pages 54 through 57 of the Reply Brief and; switching documents already in evidence, cited at pages 57 and 58 of the Reply Brief.

I); 7347:237350:18, (Exhibit "18"; Index pp. 62-65, Vol. I); 6616:20-6617:5, (Exhibit "19"; Index pp. 68-69; Vol. I); 6395:5-6401:17, (Exhibit "20"; Index pp. 72-78, Vol. I); and, in reference to which Mr. Bianchi described his comfort level as that "[j]ust like a man sitting in the electric chair." RT 4087:12-19, (Exhibit "21"; Index p. 81, Vol. I).[3]

Further evidence of possible bias is found in the fact that prior to oral argument of this case, Mr. Bianchi filed a Motion asking the Court to take judicial notice of sister Court proceedings in the United States Court of Federal Claims. See Motion for Judicial Notice filed February 13, 1997. The purpose of the Motion was to show that Bank of America, the Appellant/Cross-Respondent, in collateral proceedings in the United States Court of Federal Claims in which Mr. Bianchi was a Third-Party Defendant, had recovered fully upon obligations on which it sued Bianchi here, had recovered monies due it pursuant to that Court of Claims litigation and that the Claims Court had legally construed the instruments upon which the Bank based a major portion of its claims and defenses in this litigation. The Court ignored that Motion and, as of oral argument and the rendition of the Opinion in this case, had neither granted, nor denied it; the Court simply ignored the issues which Bianchi urged had required judicial notice. See, Motion of Respondent/Cross-Appellant for Judicial Notice of Sister Court Proceedings filed on or about February 13, 1997.

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[3] At oral argument, the Court also made an issue of the payment for the voluminous appeal record, stating that the Bank had provided Mr. Bianchi a benefit because it relieved him of the cost of providing that record. In fact, Mr. Bianchi paid for the record, including the transcripts, not the Bank.

A review of the record of the oral argument further shows that the Honorable Judge Rylaarsdam often took the lead in questioning counsel (presumably as the assigned author of the Opinion), participating fully and aggressively in a resolution of a matter on appeal from which he had been previously disqualified when a Judge of the Superior Court, and that the other Justices joined in his opinion. It appearing that Justices Sills and Wallin were unaware of Justice Rylaarsdam's previous disqualification, questions are thus raised as to whether or not Justices Sills and Wallin would have joined in Judge Rylaarsdam's opinion had they known of that fact; whether Justices Sills and Wallin, who were under a duty to independently review and consider the merits of the appeal, would have scrutinized the record more carefully because of the fact of Judge Rylaarsdam's previous disqualification; whether Justices Sills and Wallin would have forced the issue of Justice Rylaarsdam's disqualification, thus, changing the complexion of the Panel which decided the case.

By allowing a Justice who had been previously disqualified from participating in the case at the trial level to participate in and, in fact, author the Opinion on appeal, Mr. Bianchi has been denied his right to due process of the law as guaranteed to him by the California Constitution, Article I, Section 7, and by the Fourteenth Amendment to the United States Constitution[4] which provides, in relevant, portion:

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[4] Respondent/Cross-Appellant is exposing his Federal claim in this State forum only for purposes of complying with Government & Civic Employees Organizing Committee, C.I.O.v. Windsor, 353 U.S. 364 (1957). If the State Courts rule against Respondent/Cross-Appellant on the question of State law, he intends to seek resolution in the Federal system of his Federal claims.

> "Section I: All persons born and naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

All of the foregoing raises the appearance of impropriety and the deprivation of Mr. Bianchi's State and Federal due process protections. The Honorable Judge Rylaarsdam's participation in the appeal process was strictly prohibited by his prior disqualification. CCP 170.6 (2) .

Attached hereto and made a part hereof as Exhibit "22" (Index pp. 82-912, Vols. I-V) is a comparison summary, containing some of the major areas where the Court's Opinion tracks the brief Of Appellant, Bank of America, areas in which the Opinion is contradicted bythe record on appeal and how various findings, as urged by the Bank and adopted by the Court in its Opinion, are not found in or supported by the record on appeal.

II.

CONCLUSION

For the foregoing reasons, to avoid the appearance of impropriety and to resolve the apparent and actual bias suffered by Mr. Bianchi in having a Judge previously disqualified from his case participating in and authoring the Opinion on appeal in which the other Panel members

concurred, and to avoid infringement of Mr. Bianchi's due process rights and protections, this Court should recall its Remittitur, vacate the Opinion entered herein on or about May 23, 1997, assign this matter to hearing before the Court, en banc, or transfer the case to another District of the Court and allow the appeal to proceed as if the Opinion entered on or about May 23, 1997, had never been issued.

DATED this ____ day of April, 1998.

Respectfully submitted,

GRAZAIDEI & CANTOR, LTD.
/s/_____
SCOTT MICHAEL CANTOR, ESQ.
California Bar #79851
302 E. Carson Ave., Suite 400
Las Vegas, Nevada 89101
Attorney for Respondent/
Cross-Appellant

AFFIDAVIT OF MAURICE L. BIANCHI

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

MAURICE L. BIANCHI, being first duly sworn, upon his oath deposes and says:

1. That I am the Respondent/Cross-Appellant in the above-captioned matter and the Plaintiff/Cross-Defendant in the action in the Superior Court, in and for the County of Orange, from which this appeal arose; I am familiar with all facts stated in this Affidavit and I am competent to testify as to those facts of my own knowledge.

2. That I make this Affidavit in support of my Motion for Recall of Remittitur pursuant to Rule 25(d) of the Appellate Rules of Court.

3. That the trial of this matter was before a Judge sitting with a jury, in the Superior Court of the State of California, in and for the County of Orange. That Judge, the Honorable Mason L. Fenton, recused himself after the jury's verdict was entered but before ruling on my Motions for New Trial and for Judgment Notwithstanding the Verdict.

4. The Motions for Judgment Notwithstanding the Verdict and for New Trial were resolved by the Honorable Donald E. Smallwood, who was assigned to the case after Judge Fenton's recusal. However, I have learned that the Superior Court record reflects that before Judge Smallwood was assigned to the case, the case had been assigned to the Honorable William F. Rylaarsdam, then a Judge of the Superior Court of the County of Orange.

5. After receiving the Opinion in this matter, I reviewed my personal files and records of this case because the facts adopted by this Court in its Opinion did not conform to my recollection of the facts presented to the jury and received in evidence at the time of trial. In doing so, I discovered that my then-attorneys (trial counsel) had brought a Motion to Disqualify the Honorable William F. Rylaarsdam when this case had been assigned to him upon the recusal of the Honorable Mason L. Fenton. My trial counsel had not discussed that disqualification with me or advised me of that fact; it was only when, after this Court issued its Opinion herein, that I called one of my trial attorneys, Barry Capello, and told him of the Opinion and the identity of the Panel members, that he advised me that Judge Rylaarsdam had been disqualified upon our Motion filed after Judge Fenton's recusal.

6. I continued my review of the Opinion as against the record and found that in its Opinion, the Court found facts which were not contained in the record but which were urged and argued by the Bank in its briefs in this case, including false statements. My comparison summary, attached hereto and made a part of Exhibit "22", contains an accurate analysis of some of the ways in which the Opinion authored by the Honorable William F. Rylaarsdam in this case failed to conform to the record on appeal and/or, while not conforming to the facts upon the record, tracked the brief of the Bank in this action.

7.The name of the Honorable Judge Rylaarsdam did not strike any cord or bell with me when, shortly before oral argument, my Appellate counsel informed me as to the Panel of the Court to which the appeal was assigned. I even attended the oral argument. My counsel and I made no connection regarding the Honorable Judge Rylaarsdam and I

do not now recall ever seeing him when this matter was before the Superior Court. It was not until my review of the records following the receipt of the Opinion, followed by my discussion with my former trial counsel, Mr. Capello, that I became aware of the prior disqualification of Judge Rylaarsdam.

8. Had I known or been cognizant of the fact that the Honorable Judge Rylaarsdam previously had been assigned this case at the Superior Court and had been disqualified, I would have informed my Appellate counsel prior to the oral argument so that a Motion may have been made to effect Justice Rylaarsdam's disqualification or recusal in the appellate matter.

9. I believe that I have been actually prejudiced by the Court's Opinion to the extent that the Court's Opinion was authored by, and the Court's questioning at the time of oral argument included significant questioning by, the Judge who had been previously disqualified in this case at the Superior Court level.

WHEREFORE, I pray this Court for an Order recalling the Remittitur in this matter, vacating the Opinion entered by the Court on or about May 23, 1997, assigning this matter for argument before the Court, en banc, or for transfer to another Appellate District, and for re-argument of the merits of the Appeal and Cross-Appeal.

Furthermore, your Affiant sayeth naught.

/s/_____
MAURICE L. BIANCHI

SUBSCRIBED and SWORN to before me this 10th day of April, 1998.

/s/_____
ALENE HINTZ
NOTARY PUBLIC in and for
said County and State

(Case No. G014893)

PROOF OF SERVICE

1013A(3) CCP Revised 5/1/88

STATE OF NEVADA, COUNTY OF CLARK

I am employed in the County of Clark, State of Nevada. I am over the age of 18 and not a party to the within action; my business address is 302 East Carson Avenue, Suite 400, Las Vegas, Nevada, 89101.

On April 17th, 1998, I served the within **MOTION TO RECALL OF REMITTITURAND FOR FURTHER RELIEF** to all interested parties in said action by placing a true copy thereof, enclosed in a sealed envelope, by United States Mail, addressed as follows:

1 copy to: KENNETH R. CHIATE
LISA E. FELDMAN
PILLSBURY, MADISON & SUTRO
725 South Figueroa Street, Suite 1200
Los Angeles, California 90017-2513

1 copy to: Superior Court of the State of California
County of Orange
700 Civic Center Drive, West
Santa Ana, California 92701

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid at Las Vegas, Nevada in the ordinary course of business. I am

aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

Executed this 17th day of April, 1998.

I declare under penalty of perjury under the laws of the State of Nevada that the above is true and correct.

/s/_____
Employee of GRAZIADEI & CANTOR, LTD.
Attorney for MAURICE L. BIANCHI

APPENDIX M

ROBERT F. WANDRUFF
COURT ADMINISTRATOR AND
CLERK OF THE SUPREME COURT

July 24, 1997

Scott Michael Cantor
302 E. Carson Ave., Suite 400
Las Vegas, NV 89101

Re: G014893 - Bianchi v. Bank of America

Dear Mr. Cantor:

We hereby return unfiled your petition for review and check in the amount of $200, which we received July 23, 1997. A check of the Court of Appeal docket shows that the judgment was affirmed May 23, 1997. The last day to file a timely petition for review was July 2, 1997. This court lost jurisdiction to act on any petition for review July 22, 1997. (See Cal. Rules of Court, rules 28(a), 28(b).) Without this jurisdiction, this court is tunable to consider your request for legal relief.

Enclosed is the original only. Please contact this office within the next 10 days if you would like the copies of the petition returned.

Very truly yours,

ROBERT F. WANDRUFF
Court Administrator and
Clerk of the Supreme Court
/s/
By: John C. Rossi
Assistant Clerk-Administrator

APPENDIX N

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

Court convened at _____ -- _____ M. August 12, _____ 1993, present Hon. DONALD E. SMALLWOOD. Judge: M. Apodaca, Deputy Clerk; none. Bailiff: none

.

Reporter: and the following proceedings were had:

54 46 21 BIANCHI VS. BANK OF AMERICA

No appearances. Case was received on transfer from Department 31, the Honorable WILLIAM F. RYLAARSDAM having been disqualified pursuant to C.C.P. 170.6 by plaintiff/cross-defendants BIANCHI on August 4, 1993. The Court now rules as follows:

All post-trial matters and pending motions are hereby assigned to the Honorable DONALD E. SMALLWOOD, Department 1. The following motions will be heard on September 9, 1993 at 2:00 p.m. in Department 1: INDIVIDUALLY DISMISSED DEFENDANT'S MOTION FOR ORDER AWARDING DISCOVERY REFEREE'S FEES AS AN ELEMENT OF COSTS, DEFENDANT AND CROSS-COMPLAINANT BANK OF AMERICA'S MOTION FOR ORDER AWARDING (1) ATTORNEYS' FEES AND (2) DISCOVERY REFEREE'S FEES AS AN ELEMENT OF COSTS, PLAINTIFF AND CROSS-

DEFENDANT'S MOTION TO STRIKE OR TAX COSTS, PLAINTIFF AND CROSS-DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT/ and PLAINTIFF AND CROSS-DEFENDANT'S MOTION FOR A NEW TRIAL. Clerk to give notice. ENTERED: 8-12-93.

APPENDIX O

CALIFORNIA CODE OF CIVIL PROCEDURE

Sections 170-170.9

§ 170. Duty to decide proceeding

A judge has a duty to decide any proceeding in which he or she is not disqualified.

§ 170.1. Grounds for disqualification

(a) A judge shall be disqualified if any one or more of the following is true:

(1) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

A judge shall be deemed to have personal knowledge within the meaning of this paragraph if the judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is to the judge's knowledge likely to be a material witness in the proceeding.

(2) The judge served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for any party in the present proceeding or gave advice to any party in the present proceeding upon any matter involved in the action or proceeding.

A judge shall be deemed to have served as a lawyer in the proceeding if within the past two years:

(A) A party to the proceeding or an officer, director, or trustee of a party was a client of the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law; or

(B) A lawyer in the proceeding was associated in the private practice of law with the judge.

A judge who served as a lawyer for or officer of a public agency which is a party to the proceeding shall be deemed to have served as a lawyer in the proceeding if he or she personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding.

(3) The judge has a financial interest in the subject matter in a proceeding or in a party to the proceeding.

A judge shall be deemed to have a financial interest within the meaning of this paragraph if:

(A) A spouse or minor child living in the household has a financial interest; or

(B) The judge or the spouse of the judge is a fiduciary who has a financial interest.

A judge has a duty to make reasonable efforts to inform himself or herself about his or her personal and fiduciary interests and those of his or her spouse and the personal financial interests of children living in the household.

(4) The judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is a party to the proceeding or an officer, director, or trustee of a party.

(5) A lawyer or a spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse or if such a person is associated in the private practice of law with a lawyer in the proceeding.

(6) For any reason (A) the judge believes his or her recusal would further the interests of justice, (B) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification.

(7) By reason of permanent or temporary physical impairment, the judge is unable to properly perceive the evidence or is unable to properly conduct the proceeding.

(8) The judge has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in, or, within the last two years has participated in, discussions regarding such prospective employment or service, and either of the following applies:

(A) The arrangement is, or the discussion was, with a party to the proceeding.

(B) The matter before the judge includes issues relating to the enforcement of an agreement to submit a dispute to

alternative dispute resolution or the appointment or use of a dispute resolution neutral.

For purposes of this paragraph, "party" includes the parent, subsidiary, or other legal affiliate of any entity that is a party and is involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding.

For purposes of this paragraph, a "dispute resolution neutral" means an arbitrator, mediator, temporary judge appointed under Section 21 of Article VI of the California Constitution, referee appointed under Section 638 or 639, special master, neutral evaluator, settlement officer, or settlement facilitator.

(b) A judge before whom a proceeding was tried or heard shall be disqualified from participating in any appellate review of that proceeding.

(c) At the request of a party or on its own motion an appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court.

§ 170.2 Grounds not allowed for disqualification

It shall not be grounds for disqualification that the judge:

(a) Is or is not a member of a racial, ethnic, religious, sexual or similar group and the proceeding involves the rights of such a group.

(b) Has in any capacity expressed a view on a legal or factual issue presented in the proceeding, except as provided

in paragraph (2) of subdivision (a) of, or subdivision (b) or (c) of, Section 170.1.

(c) Has as a lawyer or public official participated in the drafting of laws or in the effort to pass or defeat laws, the meaning, effect or application of which is in issue in the proceeding unless the judge believes that his or her prior involvement was so well known as to raise a reasonable doubt in the public mind as to his or her capacity to be impartial.

§ 170.3 Procedure

(a) (1) Whenever a judge determines himself or herself to be disqualified, the judge shall notify the presiding judge of the court of his or her recusal and shall not further participate in the proceeding, except as provided in Section 170.4, unless his or her disqualification is waived by the parties as provided in subdivision (b).

(2) If the judge disqualifying himself or herself is the only judge or the presiding judge of the court, the notification shall be sent to the person having authority to assign another judge to replace the disqualified judge.

(b) (1) A judge who determines himself or herself to be disqualified after disclosing the basis for his or her disqualification on the record may ask the parties and their attorneys whether they wish to waive the disqualification, except where the basis for disqualification is as provided in paragraph (2). A waiver of disqualification shall recite the basis for the disqualification, and is effective only when signed by all parties and their attorneys and filed in the record.

(2) There shall be no waiver of disqualification where the basis therefor is either of the following:

(A) The judge has a personal bias or prejudice concerning a party.

(B) The judge served as an attorney in the matter in controversy, or the judge has been a material witness concerning it.

(3) The judge shall not seek to induce a waiver and shall avoid any effort to discover which lawyers or parties favored or opposed a waiver of disqualification.

(4) In the event that grounds for disqualification are first learned of or arise after the judge has made one or more rulings in a proceeding but before the judge has completed judicial action in a proceeding, the judge shall, unless the disqualification be waived, disqualify himself or herself, but in the absence of good cause the rulings he or she has made up to that time shall not be set aside by the judge who replaces the disqualified judge.

(c) (1) If a judge who should disqualify himself or herself refuses or fails to do so, any party may file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge. The statement shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification. Copies of the statement shall be served on each party or his or her attorney who has appeared and shall be personally served on the judge alleged to be disqualified, or on his or her clerk, provided that the judge is present in the courthouse or in chambers.

(2) Without conceding his or her disqualification, a judge whose impartiality has been challenged by the filing of a written statement may request any other judge agreed upon by the parties to sit and act in his or her place.

(3) Within 10 days after the filing or service, whichever is later, the judge may file a consent to disqualification in which case the judge shall notify the presiding judge or the person authorized to appoint a replacement of his or her recusal as provided in subdivision (a), or the judge may file a written verified answer admitting or denying any or all of the allegations contained in the party's statement and setting forth any additional facts material or relevant to the question of disqualification. The clerk shall forthwith transmit a copy of the judge's answer to each party or his or her attorney who has appeared in the action.

(4) A judge who fails to file a consent or answer within the time allowed shall be deemed to have consented to his or her disqualification and the clerk shall notify the presiding judge or person authorized to appoint a replacement of the recusal as provided in subdivision (a).

(5) No judge who refuses to recuse himself or herself shall pass upon his or her own disqualification or upon the sufficiency in law, fact, or otherwise, of the statement of disqualification filed by a party. In every such case, the question of disqualification shall be heard and determined by another judge agreed upon by all the parties who have appeared or, in the event they are unable to agree within five days of notification of the judge's answer, by a judge selected by the chairperson of the Judicial Council, or if the chairperson is unable to act, the vice chairperson. The clerk shall notify the executive officer of the Judicial Council of the need for a selection. The selection shall be made as

expeditiously as possible. No challenge pursuant to subdivision (c) of Section 170.3 or Section 170.6 may be made against the judge selected to decide the question of disqualification.

(6) The judge deciding the question of disqualification may decide the question on the basis of the statement of disqualification and answer and such written arguments as the judge requests, or the judge may set the matter for hearing as promptly as practicable. If a hearing is ordered, the judge shall permit the parties and the judge alleged to be disqualified to argue the question of disqualification and shall for good cause shown hear evidence on any disputed issue of fact. If the judge deciding the question of disqualification determines that the judge is disqualified, the judge hearing the question shall notify the presiding judge or the person having authority to appoint a replacement of the disqualified judge as provided in subdivision (a) of Section 170.3.

(d) The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought within 10 days of notice to the parties of the decision and only by the parties to the proceeding.

§ 170.4 Permissible actions by disqualified judge

(a) A disqualified judge, notwithstanding his or her disqualification may do any of the following:

(1) Take any action or issue any order necessary to maintain the jurisdiction of the court pending the assignment of a judge not disqualified.

(2) Request any other judge agreed upon by the parties to sit and act in his or her place.

(3) Hear and determine purely default matters.

(4) Issue an order for possession prior to judgment in eminent domain proceedings.

(5) Set proceedings for trial or hearing.

(6) Conduct settlement conferences.

(b) Notwithstanding paragraph (5) of subdivision (c) of Section 170.3, if a statement of disqualification is untimely filed or if on its face it discloses no legal grounds for disqualification, the trial judge against whom it was filed may order it stricken.

(c) (1) If a statement of disqualification is filed after a trial or hearing has commenced by the start of voir dire, by the swearing of the first witness or by the submission of a motion for decision, the judge whose impartiality has been questioned may order the trial or hearing to continue, notwithstanding the filing of the statement of disqualification. The issue of disqualification shall be referred to another judge for decision as provided in subdivision (a) of Section 170.3, and if it is determined that the judge is disqualified, all orders and rulings of the judge found to be disqualified made after the filing of the statement shall be vacated.

(2) For the purposes of this subdivision, if (A) a proceeding is filed in a single judge court or has been assigned to a single judge for comprehensive disposition, and (B) the proceeding has been set for trial or hearing 30 or more days in advance before a judge whose name was known at the

time, the trial or hearing shall be deemed to have commenced 10 days prior to the date scheduled for trial or hearing as to any grounds for disqualification known before that time.

(3) A party may file no more than one statement of disqualification against a judge unless facts suggesting new grounds for disqualification are first learned of or arise after the first statement of disqualification was filed. Repetitive statements of disqualification not alleging facts suggesting new grounds for disqualification shall be stricken by the judge against whom they are filed.

(d) Except as provided in this section, a disqualified judge shall have no power to act in any proceeding after his or her disqualification or after the filing of a statement of disqualification until the question of his or her disqualification has been determined.

§ 170.5 Definitions

For the purposes of Sections 170 to 170.5, inclusive, the following definitions apply:

(a) "Judge" means judges of the superior courts, and court commissioners and referees.

(b) "Financial interest" means ownership of more than a 1 percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value in excess of one thousand five hundred dollars ($1,500), or a relationship as director, advisor or other active participant in the affairs of a party, except as follows:

(1) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in those

securities unless the judge participates in the management of the fund.

(2) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization.

(3) The proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest.

(c) "Officer of a public agency" does not include a Member of the Legislature or a state or local agency official acting in a legislative capacity.

(d) The third degree of relationship shall be calculated according to the civil law system.

(e) "Private practice of law" includes a fee for service, retainer, or salaried representation of private clients or public agencies, but excludes lawyers as full-time employees of public agencies or lawyers working exclusively for legal aid offices, public defender offices, or similar nonprofit entities whose clientele is by law restricted to the indigent.

(f) "Proceeding" means the action, case, cause, motion, or special proceeding to be tried or heard by the judge.

(g) "Fiduciary" includes any executor, trustee, guardian, or administrator.

§ 170.6. Motion to disqualify

(1) No judge, court commissioner, or referee of any superior court of the State of California shall try any civil or criminal action or special proceeding of any kind or character nor hear any matter therein that involves a contested issue of law or fact when it shall be established as hereinafter provided that the judge or court commissioner is prejudiced against any party or attorney or the interest of any party or attorney appearing in the action or proceeding.

(2) Any party to or any attorney appearing in any such action or proceeding may establish this prejudice by an oral or written motion without notice supported by affidavit or declaration under penalty of perjury or an oral statement under oath that the judge, court commissioner, or referee before whom the action or proceeding is pending or to whom it is assigned is prejudiced against any such party or attorney or the interest of the party or attorney so that the party or attorney cannot or believes that he or she cannot have a fair and impartial trial or hearing before the judge, court commissioner, or referee. Where the judge, other than a judge assigned to the case for all purposes, court commissioner, or referee assigned to or who is scheduled to try the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be made at least five days before that date. If directed to the trial of a cause where there is a master calendar, the motion shall be made to the judge supervising the master calendar not later than the time the cause is assigned for trial. If directed to the trial of a cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 10 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 10 days after the

appearance. If the court in which the action is pending is authorized to have no more than one judge and the motion claims that the duly elected or appointed judge of that court is prejudiced, the motion shall be made before the expiration of 30 days from the date of the first appearance in the action of the party who is making the motion or whose attorney is making the motion. In no event shall any judge, court commissioner, or referee entertain the motion if it be made after the drawing of the name of the first juror, or if there be no jury, after the making of an opening statement by counsel for plaintiff, or if there is no such statement, then after swearing in the first witness or the giving of any evidence or after trial of the cause has otherwise commenced. If the motion is directed to a hearing (other than the trial of a cause), the motion shall be made not later than the commencement of the hearing. In the case of trials or hearings not herein specifically provided for, the procedure herein specified shall be followed as nearly as may be. The fact that a judge, court commissioner, or referee has presided at or acted in connection with a pretrial conference or other hearing, proceeding or motion prior to trial and not involving a determination of contested fact issues relating to the merits shall not preclude the later making of the motion provided for herein at the time and in the manner hereinbefore provided.

A motion under this paragraph may be made following reversal on appeal of a trial court's decision, or following reversal on appeal of a trial court's final judgment, if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter. Notwithstanding paragraph (3) of this section, the party who filed the appeal that resulted in the reversal of a final judgment of a trial court may make a motion under this section regardless of whether that party or side has previously done so. The motion shall be made within

60 days after the party or the party's attorney has been notified of the assignment.

(3) If the motion is duly presented and the affidavit or declaration under penalty of perjury is duly filed or such oral statement under oath is duly made, thereupon and without any further act or proof, the judge supervising the master calendar, if any, shall assign some other judge, court commissioner, or referee to try the cause or hear the matter. In other cases, the trial of the cause or the hearing of the matter shall be assigned or transferred to another judge, court commissioner, or referee of the court in which the trial or matter is pending or, if there is no other judge, court commissioner, or referee of the court in which the trial or matter is pending, the Chair of the Judicial Council shall assign some other judge, court commissioner, or referee to try the cause or hear the matter as promptly as possible. Except as provided in this section, no party or attorney shall be permitted to make more than one such motion in any one action or special proceeding pursuant to this section; and in actions or special proceedings where there may be more than one plaintiff or similar party or more than one defendant or similar party appearing in the action or special proceeding, only one motion for each side may be made in any one action or special proceeding.

(4) Unless required for the convenience of the court or unless good cause is shown, a continuance of the trial or hearing shall not be granted by reason of the making of a motion under this section. If a continuance is granted, the cause or matter shall be continued from day to day or for other limited periods upon the trial or other calendar and shall be reassigned or transferred for trial or hearing as promptly as possible.

(5) Any affidavit filed pursuant to this section shall be in substantially the following form:

(Here set forth court and cause)

State of California,) ss. PEREMPTORY CHALLENGE
County of ----------)

----------, being duly sworn, deposes and says: That he or she is a party (or attorney for a party) to the within action (or special proceeding). That -------- the judge, court commissioner, or referee before whom the trial of the (or a hearing in the) aforesaid action (or special proceeding) is pending (or to whom it is assigned) is prejudiced against the party (or his or her attorney) or the interest of the party (or his or her attorney) so that affiant cannot or believes that he or she cannot have a fair and impartial trial or hearing before the judge, court commissioner, or referee.

Subscribed and sworn to before me this
-------- day of --------, 19--------

(Clerk or notary public or other
officer administering oath)

(6) Any oral statement under oath or declaration under penalty of perjury made pursuant to this section shall include substantially the same contents as the affidavit above.

(7) Nothing in this section shall affect or limit Section 170 or Title 4 (commencing with Section 392) of Part 2, and this section shall be construed as cumulative thereto.

(8) If any provision of this section or the application to any person or circumstance is held invalid, that invalidity

shall not affect other provisions or applications of the section that can be given effect without the invalid provision or application and to this end the provisions of this section are declared to be severable.

§ 170.7 Effect of motion to disqualify on superior court appellate division judge

Section 170.6 does not apply to a judge designated or assigned to serve on the appellate division of a superior court in the judge's capacity as a judge of that division.

§ 170.8 No judge of court qualified to hear cause; Judge assigned by Chairman of Judicial Council

When there is no judge of a court qualified to hear an action or proceeding, the clerk shall forthwith notify the Chairman of the Judicial Council of that fact. The judge assigned by the Chairman of the Judicial Council shall hear the action or proceeding at the time fixed therefor or, if no time has been fixed or good cause appears for changing the time theretofore fixed, the judge shall fix a time for hearing in accordance with law and rules and hear the action or proceeding at the time so fixed.

§ 170.9 Restrictions on gifts and honoraria to judges

(a) No judge shall accept gifts from any single source in any calendar year with a total value of more than two hundred fifty dollars ($250). This section shall not be construed to authorize the receipt of gifts that would otherwise be prohibited by the California Code of Judicial Ethics adopted by the California Supreme Court or any other provision of law.

(b) This section shall not prohibit or limit the following:

(1) Payments, advances, or reimbursements for travel and related lodging and subsistence permitted by subdivision (e).

(2) Wedding gifts and gifts exchanged between individuals on birthdays, holidays and other similar occasions, provided that the gifts exchanged are not substantially disproportionate in value.

(3) A gift, bequest, favor, or loan from any person whose preexisting relationship with a judge would prevent the judge from hearing a case involving that person, under the Code of Judicial Ethics adopted by the California Supreme Court.

(c) For purposes of this section, "judge" means judges of the superior courts, and justices of the courts of appeal or the Supreme Court.

(d) The gift limitation amounts in this section shall be adjusted biennially by the Commission on Judicial Performance to reflect changes in the Consumer Price Index, rounded to the nearest ten dollars ($10).

(e) Payments, advances, or reimbursements, for travel, including actual transportation and related lodging and subsistence which is reasonably related to a judicial or governmental purpose, or to an issue of state, national, or international public policy, is not prohibited or limited by this section if any of the following apply:

(1) The travel is in connection with a speech, practice demonstration, or group or panel discussion given or participated in by the judge, the lodging and subsistence expenses are limited to the day immediately preceding, the

day of, and the day immediately following the speech, demonstration, or discussion, and the travel is within the United States.

(2) The travel is provided by a government, a governmental agency or authority, a foreign government, a foreign bar association, an international service organization, a bona fide public or private educational institution, as defined in Section 203 of the Revenue and Taxation Code, or a nonprofit charitable or religious organization which is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, or by a person domiciled outside the United States who substantially satisfies the requirements for tax exempt status under Section 501(c)(3) of the Internal Revenue Code.

For purposes of this section, "foreign bar association" means an association of attorneys located outside the United States (A) that performs functions substantially equivalent to those performed by state or local bar associations in this state and (B) that permits membership by attorneys in that country representing various legal specialties and does not limit membership to attorneys generally representing one side or another in litigation. "International service organization" means a bona fide international service organization of which the judge is a member. A judge who accepts travel payments from an international service organization pursuant to this subdivision shall not preside over or participate in decisions affecting that organization, its state or local chapters, or its local members.

(3) The travel is provided by a state or local bar association or judges professional association in connection with testimony before a governmental body or attendance at any professional function hosted by the bar association or

judges professional association, the lodging and subsistence expenses are limited to the day immediately preceding, the day of, and the day immediately following the professional function.

(f) Payments, advances, and reimbursements for travel not described in subdivision (e) are subject to the limit in subdivision (a).

(g) No judge shall accept any honorarium.

(h) "Honorarium" means any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal or like gathering.

(i) "Honorarium" does not include earned income for personal services which are customarily provided in connection with the practice of a bona fide business, trade, or profession, such as teaching or writing for a publisher, and does not include fees or other things of value received pursuant to Section 94.5 of the Penal Code for performance of a marriage.

For purposes of this section, "teaching" shall include presentations to impart educational information to lawyers in events qualifying for credit under Mandatory Continuing Legal Education, to students in bona fide educational institutions, and to associations or groups of judges.

(j) Subdivision (a) and (e) shall apply to all payments, advances, reimbursements for travel and related lodging and subsistence.

(k) This section does not apply to any honorarium that is not used and, within 30 days after receipt, is either returned to the donor or delivered to the Controller for deposit in the General Fund without being claimed as a deduction from income for tax purposes.

(l) "Gift" means any payment to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status. Any person, other than a defendant in a criminal action, who claims that a payment is not a gift by reason of receipt of consideration has the burden of proving that the consideration received is of equal or greater value. However, the term "gift" does not include:

(1) Informational material such as books, reports, pamphlets, calendars, periodicals, cassettes and discs, or free or reduced-price admission, tuition, or registration, for informational conferences or seminars. No payment for travel or reimbursement for any expenses shall be deemed "informational material."

(2) Gifts which are not used and which, within 30 days after receipt, are returned to the donor or delivered to a charitable organization without being claimed as a charitable contribution for tax purposes.

(3) Gifts from a judge's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin or the spouse of any such person; provided that a gift from any such person shall be considered a gift if the

donor is acting as an agent or intermediary for any person not covered by this paragraph.

(4) Campaign contributions required to be reported under Chapter 4 (commencing with Section 84100) of Title 9 of the Government Code.

(5) Any devise or inheritance.

(6) Personalized plaques and trophies with an individual value of less than two hundred fifty dollars ($250).

(7) Admission to events hosted by state or local bar associations or judges' professional associations, and provision of related food and beverages at such events, when attendance does not require "travel" as described in paragraph (3) of subdivision (e).

(m) The Commission on Judicial Performance shall enforce the prohibitions of this section.